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No. 604

IN THE

Supreme Court of the United States

..... TERM, 1963

CIVIL ACTION NO. 24000

FAIR DRAIN TAXATION, INC., a non-profit Michigan Corporation, JAMES J. SOULIGNY and JUANITA A. SOULIGNY, his wife, JOHN DYER-HURDEN and DOLORES DYER-HURDEN, his wife, ZACK D. EVANS and DOROTHY EVANS, his wife, LOUIS J. STAN and JOSEPHINE STAN, his wife, JOHN DURST and DOROTHY DURST, his wife, KARL R. HILDENBRAND and HALINA HILDENBRAND, his wife, THOMAS SYMS and JULIA SYMS, his wife, and W. ROSS JONES and ELIZABETH JONES, his wife,

Plaintiffs,

— vs. —

CITY OF ST. CLAIR SHORES, a Michigan Municipal Corporation, CITY OF ROSEVILLE, a Michigan Municipal Corporation, CITY OF EAST DETROIT, a Michigan Municipal Corporation, The DRAINAGE BOARD FOR THE EIGHT AND ONE-HALF MILE RELIEF DRAIN, a so-called Michigan Municipal Corporation, The DRAINAGE BOARD FOR THE STEPHENS RELIEF DRAIN, a so-called Michigan Municipal Corporation, The DRAINAGE BOARD FOR THE TEN MILE RELIEF DRAIN, a so-called Michigan Municipal Corporation, The DRAINAGE BOARD FOR THE ELEVEN AND ONE-HALF MILE RELIEF DRAIN, a so-called Michigan Municipal Corporation, The DRAINAGE BOARD FOR THE LAKE BOULEVARD RELIEF DRAIN, a so-called Michigan Municipal Corporation, The DRAINAGE BOARD FOR THE FORTIN RELIEF DRAIN, a so-called Michigan Municipal Corporation, The DRAINAGE BOARD FOR THE SOCIA-COUCHEZ RELIEF DRAIN, a so-called Michigan Municipal Corporation, The DRAINAGE BOARD FOR THE MARTIN SANITARY DIVERSION DRAIN, a so-called Michigan Municipal Corporation, The DRAINAGE BOARD FOR THE HECHTLER RELIEF DRAIN, a so-called Michigan Corporation, The DRAINAGE BOARD FOR THE MULSO-LIPKE RELIEF DRAIN, a so-called Michigan Municipal Corporation, The DRAINAGE BOARD FOR THE TEBO RELIEF DRAIN, a so-called Michigan Municipal Corporation, The DRAINAGE BOARD FOR THE ALEXANDER RELIEF DRAIN, a so-called Michigan Municipal Corporation,

All of which said Drainage Boards, so-called Michigan Municipal Corporations, consist of the following members and parties defendant herein; THOMAS S. WELSH, Macomb County Drain Commissioner and Chairman of each of said Drainage Boards, BERNARD KALAHAR, Chairman of the Macomb County Board of Supervisors and member of each of said Drainage Boards, FRANK BIEHL, Chairman of the Finance Committee of the Macomb County Board of Supervisors and member of each of said Drainage Boards, (as provided in Chapter 20 of the State of Michigan Drain Code of 1956, as amended); The COUNTY OF MACOMB, a public corpration of the State of Michigan, The HONORABLE JOHN C. MACKIE, State Highway Commissioner of the State of Michigan, and The MICHIGAN MUNICIPAL FINANCE COMMISSION, a statutory administrative body,

Defendants.

ON DIRECT APPEAL FROM THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION.

JURISDICTIONAL STATEMENT

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ON DIRECT APPEAL FROM THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION.

JURISDICTIONAL STATEMENT

In accordance with Rule 15 of the Rules of the Supreme Court of the United States, the Appellants herewith submit their Jurisdictional Statement as follows:

(a) OPINIONS BELOW

The opinion of July 16, 1963, in this matter has been reported in 219 Federal Supplement 646.

(b) SUPREME COURT JURISDICTIONAL GROUNDS

The grounds on which the jurisdiction of this Court is envoked are as follows:

(1) This is a proceeding for an Injunction against the enforcement of a State Statute, pursuant to Title 28, USC, Sections 2281 and 2284.

(2) Appellants seek a review of the Order Denying Temporary Injunction, filed and entered July 9, 1963, the judgment dismissing the Complaint and Amended Complaint with prejudice and without cost, filed July 9, 1963, the opinion of the Court as filed and entered on July 16, 1963, and the Supplemental Opinion of the Court, filed on August 5, 1963. The Notice of Appeal was filed in this matter on September 4, 1963, with the Clerk of the United States District Court for the Eastern District of Michigan, Southern Division.

(3) The Statutory provision, believed to confer on the Supreme Court of the United States, jurisdiction of this Appeal is 28 USCA, 1253, entitled, "Direct Appeals From Decisions of Three Judge Courts," reading as follows:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an Order granting or denying, after Notice and Hearing, an interlocutory or a permanent Injunction in any Civil

Action, suit or proceedings required by any act of Congress to be heard and determined by a District Court of Three Judges."

(4) The following cases are believed to sustain the jurisdiction: *Van Dyke* vs. *Geary*, 244 U.S. 39, 61 Lawyers Edition 973, 37 Supreme Court 483, affirming 218 Federal 111; *Re: Buder*, 271 U.S. 461, 70 Lawyers Edition 1036, 46 Supreme Court 557; *Clark* vs. *Poor*, 274 U.S. 554, 71 Lawyers Edition 1199, 47 Supreme Court 702, affirming 20 Federal Second 182; *Coleman* vs. *Miller*, 307 U.S. 433, 83 Lawyers Edition 1385, 59 Supreme Court 972, 122 A.L.R. 695.

(5) This matter involves the validity of a Statute of the State of Michigan, to-wit, Chapter 20 of the Drain Code of the State of Michigan of 1956 as amended, being Michigan Compiled Laws Supplement of 1956, Sections 280.461 through 280.490, as amended by Act No. 37 of the Public Acts of 1957, being Sections 11.1461 through Sections 11.1490, Michigan Statutes Annotated, appearing in Volume 8 of Michigan Statutes Annotated on pages 864 through page 877, the text of said Statute being set forth at length in the Appendix herein attached.

(c) QUESTIONS PRESENTED

The questions presented by this Appeal are as follows:

QUESTION 1.

Is the District Court, after announcing its oral opinion that the Court lacks jurisdiction over the issues and the pleadings fail to state a cause of action, and after entry of its formal order entitled, "Judgment Dismissing Complaint and Amended Complaint for Failure to State a Claim Upon Which Relief Can Be Granted," precluded from filing an

opinion in which the merits of Plaintiffs' Complaint and Amended Complaint are considered?

QUESTION 2.

Do conclusions of law based on the merits of the case, made in an opinion filed after entry of a "Judgment Dismissing Complaint and Amended Complaint" carry the weight of being res adjudicata of the constitutional issues raised in such pleadings?

QUESTION 3.

Can the District Court, in the course of hearings on preliminary argument concerning a temporary injunction and on Defendant's Motion to Dismiss, make rulings and findings of law in an opinion respecting the merits of constitutional issues raised by the Complaint and Amended Complaint, without Plaintiff having been accorded a trial of the case on its merits?

QUESTION 4.

May the District Court, over the objection of Plaintiff's counsel, exercise discretionary authority not contained in Court Rule 56(c) of Federal Rules of Civil Procedures, and proceed with the hearing of Defendant's Motion for Summary Judgment sooner than the ten (10) days notice required by said rule?

QUESTION 5.

Whether or not Plaintiff's Complaint and Amended Complaint, assuming Federal jurisdiction, stated claims upon which relief could be granted?

QUESTION 6.

Whether or not the Plaintiffs were the proper parties entitled to attack the actions of the Legislature of the State of Michigan and the constitutionality of a State Act, to-wit:

Chapter 20 of the Drain Code of the State of Michigan of 1956, as amended?

QUESTION 7.

Whether or not Chapter 20 of the State of Michigan Drain Code of 1956, as amended, is in fact, illegal, void, and unconstitutional as respects the Plaintiffs and all others similarly situated in that it constitutes a taking of property without due process of law in that a lack of adequate or sufficient notice is given to the property owners in regards to various proceedings under Chapter 20, in which they are entitled to adequate and sufficient notice as set forth in paragraphs 13, 14, 15, 20, 22, and 31 of the Amended Complaint?

QUESTION 8.

Whether or not Chapter 20 of the Drainage Code of the State of Michigan of 1956, as amended, is in fact, illegal, void, and unconstitutional as respects the Plaintiffs and all others similarly situated, in that it constitutes a taking of property, and a denial of equal protection of the law in regards to other citizens, as is set forth in paragraphs 18, 20, 40, and 50 of the Amended Bill of Complaint?

QUESTION 9.

Whether or not Chapter 20 of the Drainage Code of the State of Michigan of 1956, as amended, is in fact, illegal, void, and unconstitutional as respects the Plaintiffs and all others similarly situated, in that it constitutes a taking of property, without due process of law in that an unconstitutional, illegal, and excessive delegation and legislative and judicial powers is granted to the administrative agency (the various Drainage Boards), as set forth in the Amended Bill of Complaint in paragraphs 19, 20, 21, 26, 27, 28, 29, 30, 32, 37, 38, 39 and 40 of the Amended Complaint?

QUESTION 10.

Whether or not Chapter 20 of the Drain Code of the State of Michigan of 1956, as amended, is in fact, illegal, void and unconstitutional as respects the Plaintiffs and all others similarly situated in that it constitutes a taking of property without due process of law in violation of the taxing powers and prohibitions under the Constitution of the State of Michigan as is set forth in paragraphs 21, 22, 24, 25, 34, 35 and 36 of the Amended Complaint?

QUESTION 11.

Whether or not Chapter 20 of the Drain Code of 1956 of the State of Michigan, as amended, is in fact, illegal, void and unconstitutional as respects the Plaintiffs and all others similarly situated in that it constitutes a taking of property without due process of law in that there is little or no right to challenge the various acts of the Drainage Boards sufficiently to afford adequate protection to the property owners, as set forth in paragraphs 23, 30 and 31 of the Amended Complaint?

QUESTION 12.

Whether or not Chapter 20 of the Drain Code of the State of Michigan of 1956, as amended, is in fact, illegal, void and unconstitutional as respects the Plaintiffs and all others similarly situated in that it constitutes a taking of property without due process of law in that there is a taking of property by virtue of tax money in the lands, in that the act does not relate benefits to areas assessed nor does it charge for the burden cast upon the areas throwing the burden, as shown in paragraphs 33, 42, 43, and 44 of the Amended Complaint?

(d) STATEMENT OF THE CASE

The various Plaintiffs are residents of South Macomb County, Michigan, living respectively in the Cities of St. Clair Shores, East Detroit and Roseville. The City of St. Clair Shores, as a petitioner in all the following instances and sometimes in concert with the City of East Detroit or the City of Roseville, did petition by its governing body, the City Council, for the establishment of county drains, whereby the cost thereof was to be assessed wholly against the public corporation involved, in accordance with Chapter 20 of the Drain Code of the State of Michigan of 1956, as amended, being Michigan Statutes Annotated, Sections No. 11.1461 through Sections 11.1490, and being Michigan Compiled Law Supplement of 1956, Sections 280.461 through 280.490, as amended by Act No. 37 of the Public Acts of 1957. In accordance therewith the fourteen (14) drainage districts were thereby established, most of which have been completed except for the Alexander Relief Drain. On June 9, 1963, the Plaintiffs filed the Complaint in the Instant Cause, which was succeeded by the Amended Complaint covering substantially the same material on July 8, 1963. A short summarization of the claims of the Plaintiffs as set forth in the Amended Complaint are as follows:

> (1) Plaintiffs are residents, property owners and taxpayers in the Cities of St. Clair Shores, East Detroit and Roseville, County of Macomb, State of Michigan, and bring this suit on their behalf and as a class action on behalf of all taxpayers and property owners similarly situated in the three (3) Defendant-Cities. (Paragraph 2 of the Amended Complaint.)
>
> (2) The Defendant-Cities, County of Macomb, Highway Commissioner and Municipal Finance Com-

mission are identified in paragraphs 3, 4 and 5 of the Amended Complaint.

(3) Plaintiffs are further identified as persons entitled to due process of law and equal protection of law in all dealings affecting their property as guaranteed by the Fourteenth Amendment of the United States Constitution. (Paragraph 12 of the Amended Complaint).

(4) All of the Defendant drainage boards were created by Chapter 20 of the Drain Code of 1956 of the State of Michigan upon petition of the various cities, and have no powers or existence except by Chapter 20, and that the cost of the projects of these various drainage boards will exceed Fifty Million ($50,000,000.00) Dollars. (Paragraph 8 of the Amended Complaint).

(5) The various drainage boards under Chapter 20 apportions the costs of the drains and levies assessments therefore upon the Defendant municipalities and the other public corporations involved. (Paragraph 8 of the Amended Complaint).

(6) In turn the Defendant-Cities look to the real estate property owners and the real property in their respective municipalities to receive the monies for which to pay the cost of the drain assessed against the City. (Paragraphs 9, 10, and 11 of the Amended Complaint).

(7) If the assessments are not paid by the property owners to the municipality, it can and will result in a forfeiture of the land by the property owner to the municipality for the non-payment, even though no

benefits are received by the particular land nor no burdens causing the need for the drain are created by the particular land. (Paragraphs 9, 10, and 11 of the Amended Complaint).

(8) If Chapter 20 is invalid and unconstitutional, the money collected thereunder from these property owners, will have been collected illegally and in violation of their civil rights. (Paragraphs 9, 10 and 11 of the Amended Complaint).

(9) Chapter 20 is in fact, illegal, void and unconstitutional as respects the Plaintiffs and all others similarly situated in that it constitutes a taking of property,

(a) without due process of law in that a lack of adequate or sufficient notice is given to property owners in regards to various proceedings under Chapter 20 in which they are entitled to adequate and sufficient notice. (Paragraphs 13, 14, 15, 20, 22, and 31 of the Amended Complaint).

(b) denying equal protection of the law in regards to other citizens. (Paragraphs 18, 20, 40 and 50 of the Amended Complaint).

(c) without due process of law in that an unconstitutional, illegal and excessive delegation of legislative and judicial powers in violation of the constitutional doctrine of Separation of Powers is granted to this administrative agency. (Paragraphs 19, 20, 21, 26, 27, 28, 29, 30, 32, 37, 38 and 39 of the Amended Complaint).

(d) without due process of law in violation of the

taxing powers and prohibitions under the Constitution of the State of Michigan. (Paragraphs 21, 22, 24, 25, 34, 35 and 36 of the Amended Complaint).

(e) without due process of law in that there is little or no right to challenge the various acts of the drainage boards sufficiently to afford adequate protection to the property owners. (Paragraphs 23, 30, and 31 of the Amended Complaint).

(f) without due process of law in that there is a taking of the property by virtue of tax money and the lands in that the act does not relate benefits to areas assessed nor does it charge for the burden cast upon the areas throwing the burden. (Paragraphs 33, 42, 43 and 44 of the Amended Complaint).

(10) The action in this case is timely since very little of the tax funds have been pledged or the moneys assessed for the majority of these drains and most of the beginning procedures under Chapter 20 as to all of these drains are just beginning and everything done under the act affects vitally the property and property rights of the Plaintiffs and the rest of the members of their class. (Paragraphs 51 and 52 of the Amended Complaint).

(11) The harm to be done to the property and the property rights of these individuals showing the great need for the restraint of equity is spelled out in paragraphs 51 and 52, before further lasting, irreparable, conclusive, and irretrievable harm is done.

(12) The Defendant, Michigan Municipal Finance Commission, is a necessary party in that it contributes to the harm being done, in that it has sanctioned the bonds so far issued under Chapter 20 and can sanction the rest of the bonds to be issued under this Chapter with the full faith and credit of the State of Michigan and of the various Defendant municipalities herein, and as such these bonds being tainted with unconstitutionality will travel, and do travel, in inter-state commerce and cast a burden thereon, and as such will be a fraud on the people outside of the State of Michigan in inter-state commerce who purchased these bonds, and as such their ultimate recourse under the statutes and acts of Michigan will be to the taxpayers of these various municipalities by virtue of Chapter 20. (Paragraphs 45, 46, 47, 48, 49 and 50 of the Amended Complaint).

The relief prayed for by the Plaintiffs can be summarized as follows:

(1) A declaratory judgment that all of the provisions of Chapter 20 of the Drain Code of the State of Michigan of 1956 are unconstitutional and void as being a denial and violation of the Fourteenth Amendment of the Constitution of the United States and of various provisions of the Michigan Constitution and that the Defendant drainage boards themselves be declared unconstitutional.

(2) For relief, equitable in nature restraining the Defendants, and each of them, from taking any further proceedings or actions under the provisions of

Chapter 20 of the Drain Code of 1956, and further mandatorily requiring the return and refund to Plaintiffs and others similarly situated of all sums paid and collected under Chapter 20 that can be attributed to Plaintiffs.

(3) That all contracts and agreements entered into by the Defendant drainage boards be declared illegal, null and void, and that the various Defendant-Cities be enjoined from transferring funds or credits on account of the Defendant drainage boards and for Defendant-Cities to impound all monies collected for Chapter 20.

(4) That this Court adjudicate each and every constitutional issue raised in this case, and that a three (3) man Court be empaneled to hear the matters in this suit.

(5) That the Court grant such other and further relief in the premises as shall be agreeable to equity and good conscience.

At the Show Cause hearing as to whether the Preliminary Injunction should issue, held on June 25, 1963, the Court speaking through Judge Clifford O'Sullivan of the Circuit Court of Appeals, denied the Preliminary Injunction holding that there was a plain speedy remedy in the State Court and expressed great doubts as to whether or not the District Court had jurisdiction and further was doubtful whether the Complaint stated a cause of action for equitable relief. The Court said it would entertain a Motion to Dismiss and that the earliest hearing available for such a Motion would be July 9, 1963, should the Defendants bring such a Motion.

On July 1, 1963, the Defendant City of St. Clair Shores,

the Defendant drainage boards and their members filed their Motion to Dismiss for failure to state a claim upon which relief can be granted and served Plaintiff's Counsel with a copy thereof. On July 8, 1963, Plaintiff's statement in opposition to Motion to Dismiss was filed, Plaintiff's stating therein that they proceeded on the assumption that the Motion was filed strictly under Federal Rules of Civil Procedure No. 12(B)(6), since any other interpretation would have entitled Plaintiffs to at least ten (10) days service of said Motion before the time fixed for hearing, the Motion by the Defendant City and others being served on July 1, 1963, with the date of hearing set for July 9, 1963, not giving the Plaintiffs the ten (10) days as required under Rule 56. Plaintiffs further stated that since it was a Motion to Dismiss a pleading, and it is will settled in an American law that a Motion to Dismiss a pleading admits for the purpose of the Motion the truth of all facts well pleaded in the pleading attack and in the instances fairly deducible therefrom that the Motion in question had to be construed in the light of the Complaint or the Amended Complaint admitting the truth of all the facts well pleaded therein and any instances fairly deducible therefrom.

At the hearing held July 9, 1963, the statement of Plaintiffs as to time was reiterated by Counsel, but the Court held that they were not going to be bound in this instance by Rule 12 (b)(6), since Plaintiffs had begun the case and should have been prepared, even though they had not been afforded the ten (10) days time.

Lengthy arguments then were held upon the Motion to Dismiss for failure to state a claim upon which relief can be granted and the statement in opposition to said Motion, filed by Plaintiffs, upon the conclusion of which the Court

through the Honorable Clifford O'Sullivan, Circuit Judge, made a statement for the records, a portion of which statement is:

> "We think, therefore, without awaiting the writing of a formal opinion or memorandum that we should announce at this time our disposition of the case before us . . .
>
> "We will, upon presentation to us, of an Order to that effect dismiss the original, as well as the Amended Complaint, both on our motion and upon the motion to dismiss that has been filed by the Defendants.
>
> "We will further expose our views in a memorandum that may be filed as quickly as it can be done, but we do at this time announce our holding substantially as follows:
>
> "We find that both the original and the Amended Complaint before us do not, either of them, state a cause of action, in the jurisdiction of the Court nor do we state a cause of action."

At no time was anything else before the Court other than the original hearing on whether or not the Temporary Injunction should issue and the second Motion to Dismiss for failure to state a claim upon which relief could be founded. At no time was a hearing or trial on the merits of any of the issues in the cases as to the unconstitutionality of Chapter 20 held. Immediately after the Court's statement on July 9, 1963, an Order was entered reading as follows:

> "That the said Complaint and the Amended Complaint be, and the same are dismissed for failure to state a claim upon which relief can be granted, with prejudice and with no costs."

On July 16, 1963, the Court filed its written opinion giving reasons supposedly for the finding and Order of the Court on July 9, 1963.

On July 25, 1963, Plaintiffs filed a "Motion for Clarification of the Court's Determination", stating therein that they did not know whether the Court dismissed the cause because of lack of jurisdiction or on the merits and stating therein further that if the cause was dismissed for lack of jurisdiction, then there was nothing to decide on the merits. On August 5, 1963, the Court filed its supplemental opinion, the last paragraph thereof which reads as follows:

> "Having fully considered the Plaintiff's Motion for Clarification, this Court reaffirms its Order of Dismissal and Opinion, determining that the Complaint and Amended Complaint are dismissed on their merits for failure to state a claim upon which relief can be granted."

Plaintiffs thereupon began the instant Appeal by filing on September 5, 1963, their "Notice of Appeal to the Supreme Court of the United States".

(e) STATEMENT OF REASONS FOR PLENARY CONSIDERATION

A statement of the reasons why the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution, is as follows:

1. Should the opinion and decision of the Lower Court be allowed to stand in this case upholding the constitutionality of Chapter 20 of the Drain Code of the State of Michigan of 1956, as amended, and giving the effect of res adjudicata to that decision, then irreparable harm will be done to Plaintiff and countless other citizens of the State

of Michigan who then will be forever precluding from having a hearing on the merits as to the constitutionality of this statute and will further be deprived of due process of law by the fact that they will no longer be able to challenge the act, but instead be bound by it and subject their properties to loss because of it.

2. The questions presented are substantial in that they cut across the whole body of American Law on the constitutional questions of the doctrine of separation of powers and the powers that may be delegated to a quasi-judicial-quasi-legislative administrative authority and to the extent that powers may be freely and wholesalely granted without any consideration of the rights of the individual citizen to protest or to be heard except in the most perfunctory manner. There is a growing tendency today that if allowed to go unchecked will result in the taking away of the fundamental provisions of the Bill of Rights regarding property and the citizen's rights to the peaceful enjoyment of his property. This is the tendency of big government to become even bigger and in the process, constricting your individual citizen to the role of a helpless by-stander on the road of so-called municipal and state progress, neither giving to the individual notification of the right to be heard nor the right to be heard in matters affecting his property rights as supposedly expressly protected by the United States Constitution.

(f) MATTERS OF ABUSE OF DISCRETION BY DISTRICT COURT

The matters in which it is contended that the District Court has abused its discretion are as follows:

1. In arbitrarily deciding that the Constitutional questions as posed by the Complaint and restated in the Amend-

ed Complaint and as restated in the Statement of this case above were not sufficient grounds for issuing a Temporary Injunction restraining the various Defendants from proceeding further with any acts or actions under Chapter 20 of the Drain Code of the State of Michigan of 1956, as amended, even though in the absence of such restraint Plaintiff property owners and all others similarly situated would be liable for the payment of the enormous sums of money pledged and levied by or through the various Defendants which sums should Chapter 20 be proven unconstitutional need not have been levied or spent at all should Plaintiffs prevail.

2. The opinion of the Lower Court upholding the constitutionality of Chapter 20 of the Drainage Code of the State of Michigan of 1956, as amended, was rendered by the Court upon a Motion to Dismiss for lack of jurisdiction. At no time was the Plaintiff afforded an opportunity to present his case on the merits and the decision thus rendered is rendered by the Court predicated upon the briefs submitted and filed in this case three (3) days prior to the date of hearing and which no opportunity was presented or afforded for an answering brief to be filed and consequently the opinion of the County is one-sided, prejudiced based upon inaccuracies and misstatements of the law.

3. The Court abused its discretion in arbitrarily deciding that the provisions of Federal Rules of Civil Procedure No. 12(b)(6) were discretionary when, in fact, the provisions of said rules are mandatory in the allowance time for the preparation of the opposition's pleadings, and in particular, in the requirement of the giving of a ten (10) day notice as required under the provisions of Rule 56.

4. In deciding on July 9, 1963, that the "Amended Complaint before us do not, either of them, state a cause of action, in the jurisdiction of the Court", and then one (1) week later filing an opinion in which a decision on the merits is handed down, because if the Court had no jurisdiction it could not render a decision on the merits.

5. In arbitrarily deciding those constitutional issues favored by the Defendants to be decided and which the Defendants claim are res adjudicata, rather than deciding all of the constitutional questions as validly raised by both the Complaint and the Amended Complaint, providing of course, that they had original jurisdiction to begin with.

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APPENDIX

AMENDED COMPLAINT

Now comes the plaintiffs by their attorneys, Wilson M. Jackson and William L. Sanders, and for their Amended Complaint in this matter amend the same by first adding as party plaintiffs, all of the parties listed on plaintiffs' Exhibit I hereto attached, and including all the persons named in Paragraphs A, B and C thereof, and further amend said Complaint showing unto the Honorable Court said Complaint as amended as follows:

1. This action arises under the Fourteenth Amendment to the Constitution of the United States of America, and the "DUE PROCESS OF LAW" and "EQUAL PROTECTION OF LAW" clauses thereof; the Constitution of the United States of America, Article IV, Section 1; the Constitution of the United States of America, Article I, Section 8 (3), as hereinafter more fully appears. The matter in controversy, exclusive of interest and costs, exceeds the sum of Ten Thousand ($10,000.00) Dollars.

2. The Plaintiff, FAIR DRAIN TAXATION, INC., is a Michigan non-profit corporation, with its registered office in the City of St. Clair Shores, County of Macomb, State of Michigan, and was formed by residents, taxpayers, and property owners of the City of St. Clair Shores for the purpose of contesting drainage law legislation and of lobbying to improve the drain laws of the State of Michigan. The Plaintiffs, JAMES J. SOULIGNY, JUANITA A. SOULIGNY, his wife, JOHN DYER-HURDEN, DOLORES DYER-HURDEN, his wife, ZACK D. EVANS, DOROTHY EVANS, his wife, LOUIS J. STAN, JOSEPHINE STAN, his wife, JOHN DURST, DOROTHY DURST, his wife, KARL R. HILDENBRAND, HALINA

HILDENBRAND, his wife, THOMAS SYMS, JULIA SYMS, his wife, W. ROSS JONES, and ELIZABETH JONES, his wife, are residents, property owners, and taxpayers of the City of St. Clair Shores, County of Macomb, State of Michigan, and all of said Plaintiffs are bringing this suit on behalf of all taxpayers and property owners similarly situated, not limiting said property owners or taxpayers to those who live only in the City of St. Clair Shores, but including all others in like circumstances in the Cities of East Detroit and Roseville, together with additional parties plaintiff as enumerated in annexed Plaintiffs' Exhibit I.

3. The Defendant CITIES OF ST. CLAIR SHORES, EAST DETROIT, and ROSEVILLE are Michigan municipal corporations, situated in the southern area of the Defendant COUNTY OF MACOMB, a Michigan body politic, of which THOMAS S. WELSH is its duly elected County Drain Commissioner, BERNARD KALAHAR is the Chairman of its Board of Supervisors, and FRANK BIEHL is Chairman of the Finance Committee of said County Board of Supervisors.

4. The Defendant Honorable JOHN C. MACKIE is the duly elected State Highway Commissioner of the State of Michigan, and a constitutional officer by virtue of the provisions of the Michigan Constitution of 1908.

5. The Defendant MICHIGAN MUNICIPAL FINANCE COMMISSION is a statutory Michigan commission, created by Act 202 of the Public Acts of 1943, as amended, the members thereof being the State Treasurer, the Attorney General, the Auditor General, and the Superintendent of Public Instruction, each of whom may act under any and all circumstances through his deputy, and whose powers

and duties include advising municipalities and protecting the credit of state and municipalities to the extent of inspecting municipal records, requiring statements, examining witnesses, and giving approval to the pledging of the faith and credit of any of the municipalities or of the state, as further spelled out in said statute.

6. All of the Drainage Board Defendants came into existence since 1957, by virtue of the aforementioned Chapter 20 of the State of Michigan Drain Code of 1956, as amended, and are so-called Michigan municipal corporations by definition of the Finance Act hereinbefore referred to, and each of said Drainage Boards is composed of THOMAS S. WELSH, BERNARD KALAHAR, and FRANK BIEHL, because of their Macomb County offices, as stated in Paragraph 3 hereof, as Chairman and the members thereof respectively.

7. Each of said Drainage Boards was established by petition, filed either in pursuance of Section 463 or Section 486 of said Act, by the City of St. Clair Shores as the originating petitioner, and at times in concert with either the City of East Detroit or the City of Roseville, or both, or in its sole and individual capacity at other times, but at all times as a resolution of the governing body of each of the signatory cities, for the purpose of establishing county drains necessary for the public health, whereby the cost thereof is to be assessed wholly against public corporations.

8. Plaintiffs are informed, and have reason to believe it to be so, that the cost of all of the aforementioned drains will exceed the sum of FIFTY MILLION ($50,000,000.00) DOLLARS, and that said costs as to some of the drains will be apportioned between various municipalities, but that, as to all of the drains, the City of St. Clair Shores

will bear the substantial burden for the payment of each, as will the County of Macomb and the State Highway Commissioner and his Department.

9. In turn the municipalities where they are assessed or levied by the various drainage boards have no place to look for their share of the moneys but to the individual taxpayer, the owner of real estate within their respective community. Regardless of which of the two methods of collection against the taxpayer the use as provided in Section 490 of the Act, the tax assessed or levied by the City becomes a levy against the property of the individual taxpayer.

10. As to each taxpayer so levied and assessed and our plaintiffs have been so levied and assessed, if the payments are not made, the result will be a forfeiture of the land by the property owner and taxpayer for the non payment, even though no benefits are received by the particular land nor no burdens causing the need for the drain are created by the particular land.

11. If in the final analysis Chapter 20 turns out to be invalid and unconstitutional, the money collected thereunder from these property owners, including our Plaintiffs, will have been collected illegally and in violation of their civil rights with no hope for the return of the same and any property forfeited thereunder will have been lost completely.

12. Plaintiffs, as such taxpayers and property owners, and all other taxpayers and property owners similarly situated in these three aforesaid cities, are persons entitled to due process of law and equal protection of the laws in all dealings affecting their property, as guaranteed by the Fourteenth Amendment of the United States Constitution.

13. That while Sections 467 and 469 of said Chapter 20 of the Drain Code of 1956, recognize the constitutional right of taxpayers in Plaintiffs position to be heard, both as to the first meeting to hear any objections to the proposed drains and the petition therefor, and to the matter of assessing the cost of such drains to the designated public corporations as provided for in Section 467, and then again, to object to the apportionments made by the Drainage Boards after the tentative apportionments of costs have been made, as provided for in Section 469, however, after recognizing the right of the taxpayer to be heard on both of these sections, neither section nor any place else in said Chapter 20, is provision made for the taxpayer to receive notice reasonably calculated to apprise him of the pendency of these actions and of his right to present his objections at such hearing, such failure to provide for notice being a denial of due process of law under the Fourteenth Amendment of the Constitution of the United States and hence, rendered proceedings under said Chapter 20 of the Drain Code of 1956 void and unconstitutional.

14. Plaintiffs in fact as residents of the various municipalities herein involved, to-wit: the Cities of St. Clair Shores, East Detroit, and Roseville, have in fact, received no individual notice by mail or otherwise reasonably calculated to apprise them of the pendency of these actions and of their right to present their objections at any such hearings.

15. That even if said sections of the Drain Code did provide adequate notice to apprise the taxpayers of their right to appear and be heard at the aforesaid two hearings provided for in Sections 467 and 469, the taxpayers still would not know whether or not they would be within the group to be assessed, since the matter of levying against

individual taxpayers, under said Chapter 20, is the very last act contemplated to be done, provision therefor being made in Section 490 of said Chapter 20; said Section 490 providing that after all the assessments and apportionments have been made against the individual municipalities and the amounts determined as between the municipalities and the tentative cost of the entire project being determined as against the municipalities, *then, and only then,* shall the municipality determine which of two methods it shall use in assessing its individual taxpayers, having the option to:

A. Proceed by a general levy against all of the property within the municipality; or

B. Establish a special assessment district and decree that only those taxpayers whose property falls within that special assessment district shall be liable for the cost.

That therefore, the taxpayer, even if he had adequate notice of the hearing, still would not know if it applied to him, since he would not know whether or not he would be liable so that he could exercise his right to be heard and object; that taxpayers' liability under these sections is not established until all of the procedural matters have been accomplished, the amounts levied, and everything else contemplated to be done by a drainage board in the letting of contracts and financing of a drain have been finished, all of which constitutes a denial of due process of law in violation of the Fourteenth Amendment of the Constitution of the United States, and therefore, further renders Chapter 20 of the Drain Code of 1956, as amended, unconstitutional.

16. In fact, Plaintiffs as taxpayers of the three cities involved, to-wit: St. Clair Shores, East Detroit, and Rose-

ville, have received no notice at any time as to the method of assessment adopted by their particular municipality nor has it been possible for the municipality to notify the individual taxpayers by virtue of Section 490 as spelled out in Paragraph 15 hereof, in time for the taxpayer to appear at the first hearing on objections to apportionment or at the hearing on the final order of determination or the final order of apportionment since at the time of these hearings neither the taxpayer nor the municipality knows that the taxpayer is in the class of persons to be assessed.

17. As a result thereof, determinations are being made which can and do result to the individual taxpayer and have resulted to the individual taxpayer in the deprivation of his property through a denial of due process of law in violation of the Fourteenth Amendment of the United States Constitution.

18. That by the method of municipal assessment as provided for in Chapter 20 of said Drain Act, which has the municipality filtering down the actual assessment to the taxpayer at large as a general tax, said act violates the provisions of the Fourteenth Amendment of the United States Constitution, and the equal protection of the law clause thereof, in that one taxpayer living in one municipality may be residing across the road from a taxpayer in an adjoining or contiguous municipality, which in fact, is the case in actual existing situations, as for example a taxpayer living in municipality A, for instance, the City of St. Clair Shores, will be paying a larger amount of tax than the taxpayer living in Municipality B, in this case the City of Roseville, even though both taxpayers contribute the same amount to the burden and receive the same benefit from the proposed drain; Municipal apportionment under

Chapter 20, which completely fails to take into account the rights of the individual taxpayer or in his property.

19. That Chapter 20 aforesaid fails entirely in its framework to set up the preliminary steps, standards, guides, and controls necessary for a municipality to be taken in holding public hearings regarding the adequacy and necessity of drains in order to provide the governing body of a municipality with a basis of authority and a proper determination to proceed with the preparation and filing of a petition, as authorized by Sections 462 and 463 of said Chapter 20; that the absence of such preliminary protection provisions in said sections deny and deprive Plaintiffs and others in interest of due process of law and equal protection as intended under the Fourteenth Amendments to the United States Constitution and Article II, Section 16, of the Constitution of the State of Michigan.

20. That the arbitrary filing of a petition with the Drain Commission by a municipality under the authority complained of in Sections 462 and 463 of Chapter 20 aforesaid, without the safeguards constitutionally required to insure exercise of due process and equal protection to individual taxpayers, involuntarily, without notice, without hearing, and without opportunity to consider proofs of necessity, wrongfully commits Plaintiffs and others in the same class to assume vast tax obligations for new drains, without any indication of the cost thereof to either the municipality or the taxpayer for upwards of thirty years, and therefore is an abrogation of constitutional guarantees denying the taxpayers and Plaintiffs due process and equal protection as aforesaid;

21. Plaintiffs further allege that by the denial of due process of law guaranteed to them under the Fourteenth

Amendment of the Federal Constitution, drainage boards created by said Sections 464 of Chapter 20 abrogate taxpayers' rights to due process of law to approve or reject the action of Defendant municipalities to petition for drain construction and also to tax beyond the constitutional limitation of fifteen (15) mills, as provided by Article X, Section 21, of the Michigan Constitution of 1908; that the abrogation of constitutional rights herein complained of arises directly from the arbitrary power vested by Section 463, Chapter 20, which in effect permits a municipality to appoint the Drain Commission, its irrevocable agent, and to delegate to its Drainage Boards infinitum irrevocable authority tantamount to permanent, supreme, final power to adjudge necessity, levy assessment by apportionment of cost, contract and obligate itself for expenditure of vast sums of money to be levied and collected by the municipality and other public corporations affected, and to enter into securities financing, borrow money in anticipation of collections, and generally to be the unbridled, irrevocable agent of the municipality or other public corporations affected without any chance to recall the petition filed; that such unrestricted administrative discretion is greater and broader than charter or statutory powers possessed by such municipal and public corporations, and that by said appointment and delegation complained of as unconstitutional, such municipal and public corporations are reduced to captive victims of the several drainage boards without limitation as to time or cost;

22. Plaintiffs further allege and charge the fact to be that the legislative device complained of in Paragraph 21 above is unconstitutional, both under Michigan and United States Constitutions, in that under Chapter 20, aforesaid, due process is denied to taxpayers ultimately to be burdened

with the cost of the drains ordered, by the devious procedure to accomplish indirectly without notice or mere gesture of notice an objective that may be rejected directly if put to electors, and thus is not due process, and amounts to a studied avoidance to deny taxpayers rights, with the consequent injury and harm to said taxpayers over the original thirty (30) year period contemplated necessary to permit collection of taxes in an amount sufficient to meet the principal and interest required on the proposed bonds; that as such it is confiscatory and an abrogation of the constitutional rights guaranteed under both Federal and State Constitutions.

23. That proceedings by certiorari for review as provided in Section 483 of said Chapter 20 are wholly inadequate since mere compliance with other sections of said Chapter 20 by the drainage boards has the effect of stamping all proceedings as regular, without consideration of constitutional guarantees, which Plaintiffs herein claim to be missing and which, in fact, render the whole of Chapter 20 inadequate, unconstitutional, and a denial of due process of law as to Plaintiffs and all other taxpayers similarly situated, and particularly, since taxpayers do not have adequate notice of the hearings which toll the running of the time to seek the limited review provided.

24. That provisions of Chapter 20 of said Drain Code, calling for the spreading of a drain assessment as to a particular municipality upon the books of the city as a whole, and the taxing thereby of all of the taxpayers by means of general taxation, does create under general tax limitations called for by the charters of these respective municipalities, an illegal burden in that it far exceeds the millage limitation called for either in the charter of these municipalities or by the constitution of the State of Michigan, of 1908, as amended and are unconstitutional therefor.

25. That Sections 475 of Chapter 20 of the Drain Code of 1956, violates said Article X, Section 21 of the Michigan Constitution of 1908, in that it specifically and arbitrarily, without any right or justification under law or by any logical reasoning, provides for the total disregard of the constitutional limitation on the power of taxation which in said constitutional limitation is restricted to a maximum of 15 mills for all taxes assessed, "for all purposes", unless certain alternative procedures designed to give notice to taxpayers are followed by election to secure their approval; that by said Section 475 the Legislature of the State of Michigan has attempted arbitrarily to amend the Constitution of the State of Michigan, which it has no right to do, unless it submits the same to a referendum vote of all the people, which was not done; that all of the above constitutes to your Plaintiffs and all other taxpayers similarly situated, a denial of due process of law in the taking of their property, and a complete abrogation of fundamental property rights that inure to them as taxpayers and citizens under the Federal Constitution;

26. That Section 467 of said Chapter 20 of the Drain Code of 1956, as amended, is unconstitutional as a denial of due process of law in that it is arbitrary, confiscatory, and an unconstitutional delegation of judicial and legislative powers to an administrative board, without any safeguards or controls or guides to aid the board in arriving at its determinations in that:

A. No standards are set up or guideline established for this administrative board to guide in it making its tentative determination as to the sufficiency of the petitions;

B. No guidelines or standards are set up to determine the practicability of the proposed drains;

C. No guidelines are set up to make a tentative determination of the public corporations to be assessed: and

D. No provision is made for any determination as to the benefits or burdens cast upon the proposed drain by the various individual properties owned by the individual property owners, who will ultimately pay the same.

27. That Section 468, of Chapter 20 of the Drain Code of 1956, is unconstitutional and a denial of due process of law as to Plaintiffs and all others similarly situated, in that it violates the doctrine of separation of powers in allowing arbitrary judgment to be made by the drainage board in a quasi-judicial and quasi-legislative capacity, without any standards or guidelines to enable it to determine the same, in the following respects:

A. The drainage board is to select the route of the drain, but arbitrarily, the drainage board is not limited to the route of the drain as described in petition, but may determine in whichever direction it wishes said route to proceed.

B. No standards or guidelines are established for the Board to determine the percentage of the cost of each drain, to be borne by each public corporation, but rather, just a vague statement:

> "There shall be taken into consideration the benefits to accrue to each public corporation, and also to the extent that each public corporation contributes to the condition which makes the drain necessary."

as the only guideline provided in determining the proportion of costs as between the public corporations.

C. No determination is to be made whatsoever by the Board in this section or any other section as to the benefits to accrue to each individual taxpayer, or as to the extent that each individual taxpayer contributes to the condition which makes the drain necessary.

28. That Section 369, of said Chapter 20 of the Drain Code of 1956, is unconstitutional and constitutes a denial of due process of law in that it is arbitrary, confiscatory, and in violation of the doctrine of separation of powers under Article IV Sections 1 and 2 of the Michigan Constitution of 1908 as to these property owners and taxpayers who are Plaintiffs herein, in that it unlawfully and illegally delegates judicial and legislative functions to an administrative body without any standards or guidelines for the exercise of such judicial or legislative discretion, in the following respects:

A. Without any standards or guidelines being established, the Drainage Board may confirm the apportionments it has previously arbitrarily established or may readjust the same without any means other than the word "inequitable" of determining whether the same shall be adjusted or reapportioned or granted as they stand.

B. That although the public corporations to be assessed or taxpayers may be present at such hearing, the Board may arbitrarily without giving its reasons therefor, completely ignore the suggestions of the taxpayers or the public corporations to be assessed,

and arbitrarily establish what figures these apportionments shall be in the percentages of apportionments, without any recourse to any guidelines or set standards in determining the same, except the word "inequitable."

29. Section 471, of said drain code, is unconstitutional and a denial of due process of law, and is in violation of the doctrine of separation of powers as provided for in Michigan Constitution of 1908, Article IV, Sections 1 and 2, in that drainage boards are given unlimited contractual powers, with the right to select, arbitrarily, the persons with whom it wishes to contract, the persons to whom it wishes to award any contract, the subject matter of any contract, or with anyone else in any respect and in any manner it sees fit relative to the construction and maintenance of any drain, without any guidelines or standards to determine, or aid it to any standards set up as to the manner of contracting, in whole or in part, the work for this project, or without any limitations or standards or guidelines as to the prices to be paid, the bids to be selected, or any need to select the lowest bid or a bid in conformity with any standard whatsoever, although said section does call for bids, but with no standards or guidelines to aid the Drainage Board in deciding just what type or kind of bid it shall take, nor with any standards or guidelines limiting it to the best bid, the lowest bid, or any other bid;

30. That Section 471, of Chapter 20 of the Drain Code of 1956, is arbitrary, confiscatory, and unreasonable as a denial of due process of law in relation to these property owners, taxpayers, and plaintiffs and others similarly situated, in that although the drainage board may require the County Treasurer to be accountable for all moneys belong-

ing to the Drainage District; that nowhere in said section nor anywhere else in said Act is there any accountability placed upon drainage boards themselves, or any member thereof, nor is there any limitation placed upon any expenditure by the drainage board, nor is there any requirement upon drainage boards to account or inform taxpayers as to moneys received and moneys expended, work in process or completed and balances remaining on hand for each drainage board created;

31. That Section 473 of said Chapter 20, constitutes an unconstitutional denial of due process of law, and is arbitrary and confiscatory in that it vests drainage boards with the power to establish special assessment rolls against the various several public corporations, but fails to take into consideration the preparation of such special assessment rolls against ultimate taxpayers, residing within these several public corporations; nor does it establish apportionment districts based on benefits to be received or burdens to be created upon the area to be drained, and thus does not afford taxpayers any idea of the prospective amount to be borne individually;

32. That as to these Plaintiffs and all other property owners similarly situated, Section 475, of Chapter 20 of the Drain Code of 1956, is unconstitutional as a violation of due process of law in that it constitutes an arbitrary and confiscatory grant of legislative power in allowing the drainage boards to levy taxes, the levying of taxes being a legislative function; that further it is arbitrary and confiscatory as an illegal grant of legislative power in allowing drainage boards to impose taxes without any standards to guide the drainage boards in the establishment of such taxes without limitations as to the amount to be collected

or assessed; that in fact allowing said drainage boards to create an entirely new tax without any constitutional authority whatsoever or power lawfully vested in them by specifically declaring that "assessments made shall not constitute an indebtedness of a public corporation within any statutory or charter debt limitation" is a circumvention of the constitutional limitation upon taxation by labeling the burden imposed as an "assessment" rather than a tax as indeed it is when the municipality assessed spreads it at large or as an ad valorem tax;

33. That Plaintiffs allege that due process of law has been denied to them under Article II, Section 16 of the Michigan Constitution of 1908 and also under the Fourteenth Amendment, Section 16 of the Michigan Constitution of 1908 and also under the Fourteenth Amendment, Section 1 of the United States Constitution for the reason that Sections 467 of Chapter 20 of the Drain Code of 1956, as amended, relating to the preemptive making of a "Final Order of Determination" and subsequent method of notice to hear objections thereto, fails to provide proper, adequate, and constitutional notice and opportunity to be heard and present proofs or objections made, and that Section 469 of said Chapter 20, etc., relating to the preemptive making of a "Final Order of Apportionment," and subsequent method of Notice to hear objections thereto, also fails to provide proper, adequate and constitutional notice to be heard and present proofs on objections made, said sections thus impairing the full faith, credit and integrity of the bonds of the several drainage districts with respect to pending applications for loans and for contribution grants from Federal agencies which funds are intended to defray part of the cost of construction in anticipation of tax collections.

34. That although Section 468 of the Drain Code of 1956 was amended in 1957 by Public Act 37 to provide that:

> "A drainage board shall designate the area to be served by the drain project, which may or may not include all of the area in any public corporation to be assessed."

the defendant drainage boards have entirely disregarded this safeguard intended by the 1957 legislature to correct the obvious inequity existing and permit more equitable assessment of costs, and have laid assessments upon the defendant cities of St. Clair Shores, Roseville, and East Detroit, without relating areas assessed to benefits resulting.

35. That defendant City of St. Clair Shores having levied at large assessments laid upon it by the several drainage boards as a general tax has done so or is about to do so in violation of Article X, Section 21 of the Michigan Constitution providing for an approval by majority vote of electors when:

> "The total amount of taxes assessed against property for all purposes in any one year shall exceed one and one-half per cent (15 mills) of the assessed valuation of said property."

Further, that the said assessments at large are in violation of Section 7 of the Municipal Finance Act, being Act 202 of 1943 as amended, which Section requires as a condition precedent to approval for the issuance of bonds proposed, a

> "Voted increase in the tax rate limitation in an amount and for a period of time necessary to permit the collection of taxes in an amount sufficient to meet the interest and principal requirements on the proposed bonds";

36. Plaintiff further alleges that Defendant City of St. Clair Shores, by levying its apportionments at large against all taxpayers, adopts the fallacious theory that the assessments laid upon it by the several drainage boards is a tax within the meaning of constitutional provisions requiring taxes to be uniform and to be levied in proportion to the value of the property taxed: that said defendant City levying the assessment on such principles regards its assessment not as local in nature but as a general tax levied for a specific purpose; that such application of taxation is invalid in the absence of compliance with Article X, Section 21 of the Michigan Constitution of 1908 which provides for an election approving by majority vote an increase of the total amount of taxes beyond 15 mills in any one year of the assessed valuation of all property and is in violation of due process of law under both Federal and Michigan Constitutions, and further violates the validity of assessments to be apportioned according to benefits.

37. That Section 476, of said Chapter 20 of the Drain Code of 1956, providing for the issuance and payment of bonds and collection of assessments and installments on said bonds, is unconstitutional as denying due process of law violating Article IV, Section 1 and 2 of the Michigan Constitution of 1908 guaranteeing separation of powers and equal protection of the laws, by the illegal delegation of legislative and judical functions in the manner of levying and assessing taxes; that said Section 476 provides for the sale of bonds, pledging the full faith and credit of the various drainage boards which, indirectly pledges the full faith and credit of taxpayers and their properties by anticipating the sale of said bonds and the collection of all installments of assessments and taxes, which assessments and

taxes are herein challenged as unconstitutional in the preceding paragraphs hereof in Sections 465, 467, 468, 469, 471 and 473 of Chapter 20 of the Drain Code of 1956 as amended.

38. That Section 477, of said Chapter 20 of the Drain Code of 1956 is unconstitutional as denying due process of law by violating Article IV, Section 1 and 2 of the Michigan Constitution of 1908 guaranteeing separation of powers in that it delegates judicial and legislative functions to an administrative body by vesting such drainage boards with unlimited discretion in levying additional assessments should the original assessments for bond payments develop to be insufficient to pay the principal and interest on said bonds:

39. That Section 478, of said Chapter 20 of the Drain Code of 1956, is unconstitutional as denying due process of law by violating Article IV, Section 1 and 2 of the Michigan Constitution of 1908 guaranteeing separation of powers by the delegation of legislative and judicial functions, in that said section provides for the levying of a continuous tax, for operation and maintenance of drains in an amount to be established from time to time as these administrative drainage boards may see fit, without any standards or guidelines to follow, except that they shall be "in the same proportion as the cost of the drain was assessed":

40. That to Plaintiffs and all other property owners and taxpayers similarly situated, Section 480, of Chapter 20 of the Drain Code of 1956, is unconstitutional as denying due process of law and equal protection, in that said section is arbitrary, confiscatory and harsh; that coupled with the provisions of the Code providing for the unrestrained assessment power of drain boards, no limitations are placed upon them violating Article IV, Sections 1 and 2 of the

Michigan Constitution of 1908 relative to the separation of powers in that, said drainage boards:

1. Have the right to include in the cost of any drain the cost of locating, establishing, and constructing the drains, without limitation placed thereon, as to what bids should be accepted, what amounts are reasonable, or other items, included in the cost of drains;

2. Shall include administrative and other expenses without limitations of any nature;

3. Shall include the cost of construction of bridges and culverts without limitations thereon as to whether needs exist for bridges and culverts;

4. Shall include the cost of acquiring any lands and/or rights of way without limitation upon which lands are necessary;

5. Shall include all engineering, legal and other professional fees as part of the costs; no limitation being placed upon extent of engineering, legal, or other professional services required. Said section also includes, as part of the costs, an amount not exceeding ten (10%) per cent of the gross sum to cover "contingent expenses," without explanation, definition, guide or standard to determine reasonableness or limitation of expenses labeled as "contingent."

Further, allocation of ten (10%) per cent for "contingent expenses" under the Chapter 20 drain program proposed, estimated to cost Fifty ($50,000,000) Million Dollars, thus will make available for disbursement up to Five ($5,000,000.) Million dollars practically without supervision

or auditing and for any expense whatsoever directed or approved by the defendant Drain Commissioner and Drain Commission;

41. Have the power to defy and in fact defied constitutional officers of the State of Michigan in denying them access to the right of review of their books and records in order to comply with said officers' constitutional responsibilities in acting as watchdogs for the people and taxpayers involved in the drainage proceedings with respect to examining their financial activities and expenditures of the vast sums of public funds allocated and assessed by the drainage boards. This defiance is carried out in pursuit of the vast unbridled powers given to the drainage boards by Chapter 20 which Plaintiffs claim affords them no protection in the taking of their tax moneys and properties without sufficient safeguards to protect the reasonable expenditure of the same, and accounting therefor.

42. That Section 482, of Chapter 20 of the Drain Code of 1956, is unconstitutional as denying due process of law in that it provides for the cleaning out and widening, etc., of any existing county drain or portion thereof, or hereinafter existing, applying thereto the same method of financing as is used in the general construction of new drains, failing to take into consideration that existing County drains formerly created as special assessment districts were assessed according to benefits conferred to property owners instead of at large, the effect being to compel all taxpayers to contribute for services benefiting only those in the assessment district;

42. That as appears by Plaintiffs' Exhibit 1, hereto annexed, entitled: "Notice of sale—$468,000.00 County of Macomb, State of Michigan, Martin Sanitary Division

Drain Bonds", is a typical offering of bonds to be sold June 20, 1963, at eleven o'clock A.M.; That said Notice of Sale states among other things that "The assessment made against the City of St. Clair Shores has been paid in full, but the assessment against the City of Roseville is a general obligation of said City, and said City is obligated and has the power to *levy ad valorem taxes* upon all the property within its limits in an amount sufficient to pay the assessment against it, with interest without limitation as to rate or amount";

44. That the sale of bonds proposed by said Exhibit 1, aforesaid, is a typical exercise of the board powers vested under Chapter 20 of the Drain Code of 1956 as amended which powers are protested and challenged by this suit as unconstitutional under both Federal and State of Michigan Constitutional provisions; that said notice clearly stating that the cost assessed may be levied as ad valorem taxation, that is to say, as general taxes upon all property owners according to valuation without regard to benefits conferred or without regard to the burden contributed by the owners of lands to be drained;

45. That it is the intention of the Defendant Drain Commissioner and Defendant Drainage Boards of which the Bond offering in Paragraphs 43 and 44 is typical, to finance the construction of the drains proposed by the issuance of bonds, and to distribute said bonds in interstate commerce through securities dealers with offices in different states, who will offer and sell said bonds publicly to purchasers in various states.

Plaintiffs further allege that said proposed bonds, traversing in interstate commerce, will in fact be tainted with constitutional deficiencies in that a false presumption of

due process of law will be accorded to them when in fact said bonds will be devoid of due process of law as defined and intended under both the State of Michigan Constitution of 1908 and the United States Constitution, as hereinafter charged with more particularity.

46. Plaintiffs further allege that the statutory requirements of the Municipal Finance Act, Act 202 of 1943, as amended, for the approval by the Defendant Municipal Finance Commi sion therein created, of bonds proposed to be sold by drainage boards is unconstitutional in that it violates the equal protection and due process provisions of the United States Constitution and Michigan Constitution in:

(A) That the title "Municipal Finance Act", and the Commission created by it, the "Municipal Finance Commission," are both false and misleading; that the name "municipal" vested on both the act itself and its commission in Section 2(A) specifically includes, in addition to communities of people such as counties, townships, cities, and villages, administrative statutory bodies such as school districts, metropolitan districts, port districts, drainage districts "or other governmental authority or agency within the state with power to issue any of the obligations authorized or regulated by this Act";

(B) That the wholesale inclusion by definition of such other statutory bodies and agencies named and unnamed as "municipalities" creates a legal fraud and misrepresentation upon ultimate investment purchasers beyond the sophisticated and informed securities dealers who may purchase such bonds and obligations at discounts not exceeding ten (10%) per cent as provided in Section 2 of said Act 202 and also through underwriting arrangements, with

dealers who afterwards sell and distribute them in interstate commerce to uninformed investors as "municipal bonds," said securities dealers uniformly operating and advertising offerings out of their "Municipal Bond Departments";

47. That as a consequence of the misnomers created as complained of in sub-section (A) and (B) of Paragraph 46 above, a permissive lawful usage of the words "municipal", "municipality", "Municipal Finance Act", "Municipal Finance Commission", "Municipal Bond Department", etc., has become rampant, and although without redress to the investor when damage results (as it has in recent history) such appellations are false and misleading and practice fraud, deceit, and misrepresentation on naive and uninformed investors.

48. That many such investors in reliance of the ordinary connotation of the noun "municipal" or "municipality" consider that a community of people as taxpayers is responsible for the return of their principal investment, interest and profit, whereas, in truth and in fact, the pledge of full faith and credit of the administrative body or agency, deriving vast power of levying assessments upon true municipalities, collecting from them and disbursing moneys, is the sole entity relied upon as a matter of law; that the misrepresentation thus made wrongfully results in a release of liability of the taxing bodies, i.e., the Cities of St. Clair Shores, East Detroit and Roseville, if, as, and when said bonds in the hands of investors are by judicial decree declared to be invalid and uncollectable for any reason;

49. That such bonds and obligations, regardless of issuing source, being entitled to bear the outward impression of "municipal status are specifically exempt from

registration under the Federal Securities and Exchange Act of 1933, as amended, in Section 3A2, therein enjoying the august status of a "security issued or guaranteed by ***any public instrumentality of one or more states***, are sold distributed and dealt with freely in interstate commerce without any restraint whatever and, on information and belief, this feature of federal exemption, in contract to registration requirements attaching to private corporations, is often pointed to as an assurance of safety and security, all of which relates back to the false, misrepresentative definition granted such bonds and securities and operating as a fraud upon investors in interstate commerce;

50. That as aforesaid in Paragraphs 40, 42, 46A and 46B equal protection within the provisions of the Fourteenth Amendment, Section 1, of the Federal Constitution and Article II, Section 16, of the Michigan Constitution, is denied to persons in interstate commerce by operation of Act 202 of the Public Acts of 1943, as amended, and in particular with the defining section 2 (A) thereof, which in turn permits various sections throughout the said act to describe drainage boards, such as complained of in this complaint, as "municipalities" in turn creating a false and fraudulent status, albeit legal, based on legislative sanction but nonetheless wrongful, harmful, and deceitful, from which citizens were intended to be protected by the prohibition of the Fourteenth Amendment, Section 1 of the Constitution of the United States and by Article II, Section 16, of the Michigan Constitution.

51. That unless jurisdiction of these issues and matters is assumed and retained by the United States District Court for the Eastern District of Michigan, Southern Division, to pass upon the Constitutional questions involved, irrepara-

ble harm and financial loss will be suffered by investors within The State of Michigan and in other States upon adjudication that said bonds and the drainage boards issuing them fail to comply with either Federal and State of Michigan Constitutional requirements.

52. That unless a three (3) Judge District Court is convened in accordance with Title 28, United States Code, Sections 2281 through 2284, to hear the constitutional questions herein presented as to due process of law, separation of powers, and other questions raised herein, and grant equitable and injunctive relief to the Plaintiffs herein, these Plaintiffs will be irreparably harmed in that:

A. Tax moneys will be collected from them, which if they are successful in this matter, they have no hope of recovering since the statutes of the State of Michigan do not provide for the return of these tax moneys even if collected under protest.

B. Various municipalities within Macomb County, such as the City of St. Clair Shores, City of East Detroit, and City of Roseville will contribute from its general fund tax dollars paid by Plaintiff and all others in a similar position to the various illegal, unconstitutional drainage boards created by Chapter 20 of the Drain Code of the State of Michigan of 1956, as amended.

C. The various drainage boards will continue to commit Plaintiffs and other taxpayers similarly situated and municipalities within their jurisdiction to extravagant financial burdens without their consent or approval and the consequent collateral expense for engineering and legal services, construction costs, and many other incidental charges naturally arising all of which will be paid from funds under their

control and none of which will be recoverable upon adjudication that such expenses were unconstitutionally contracted;

WHEREFORE, Plaintiffs pray:

1. That this Court adjudge all of the provisions of Chapter 20 of the Drain Code of the State of Michigan of 1956, as amended, being Sections 461 through 490 of said Drain Code, be declared and adjudged unconstitutional and void as a denial and violation of the Fourteenth Amendment of the Constitution of the United States, and in particular, of its due process and equal protection of the law clauses thereof; and of Article IV, Section 1 the full faith and credit clause thereof, and Article I, Section 8 (3), and the Interstate Commerce Clause thereof, and of the Constitution of the State of Michigan of 1908, Article II, Section 16 and Article IV, Sections 1 and 2, and Article X, Section 21, as hereinbefore set forth in the various paragraphs in this Complaint;

2. That this Court adjudge all of the Defendant drainage boards as unconstitutional in their powers and rights vested in them, and that their functions as Administrative boards be held to be in direct violation of the constitutional guarantees of these Plaintiffs and all others similarly situated, as provided for their protection in the Fourteenth Amendment of the United States Constitution under the due process clause and the equal protection clause thereof;

3. That this Court adjudge all of the Defendant drainage boards to be in violation of the provisions of the Michigan Constitution of 1908, Article IV, Sections 1 and 2, and of the United States Constitution as to separation of powers;

4. That this Court may require the Defendant Drain Commissioner and each of the Defendant drainage boards to show cause why they and each of them should not be permanently enjoined from taking any further proceedings or actions under the provisions of Chapter 20 of the Drain Code of 1956 as amended and that until such hearing, that they be temporarily restrained to function as drainage boards;

5. That this Court may enter an appropriate Order requiring that the Defendant Drain Commissioner and each and every drainage board cause and take whatever steps that may be necessary to refund to Plaintiffs and others similarly situated, all sums paid under assessments levied and collected ad valorem; that payments of assessments laid upon the Defendant Michigan State Highway Department and the Defendant County of Macomb be impounded and further payment by them be suspended and prohibited until the further order of this Court;

6. That this Court may enter its order voiding and nullifying all contracts and agreements entered into by the Defendant drainage boards and each of them with any persons, firms or corporations for any services or work of whatever nature and purpose; that pending final disposition of the issues involved in this suit, this Court provide by interim order adequate provision to preserve the status quo of all services and assets of such persons, firms or corporations concerned with the performance of any contractual obligation;

7. That this Court may enter its order requiring the Cities of St. Clair Shores, Roseville and East Detroit to impound all moneys collected from ad valorem levies based on assessments laid upon them by the Defendant drainage

boards, and that said cities be enjoined from transferring such funds or credits to the Macomb County Treasurer for the account of the Defendant Drain Commissioner or any and all of the Defendant drainage boards;

8. That this Court adjudicate each and every constitutional issue raised by this suit and in particular all constitutional infringements complained of as violating rights guaranteed to Plaintiffs as taxpayers under both Federal and State Constitutions; and of the Constitutional guarantees of persons not parties to this suit but who are affected by the issues raised regardless of their residence;

9. That the issues and matters raised in this suit and of which Federal adjudication is sought be heard and tried in accordance with Section 2284 of Title 28, United States Code by a three Judge District Court therein provided;

10. That Plaintiffs and all others similarly situated may have such other and further relief in the premises as shall be agreeable to equity and good conscience.

And your Plaintiffs will ever pray.

WILSON M. JACKSON and
WILLIAM L. SANDERS
Attorneys for Plaintiffs
Suite 332 Eastland Center
Professional Building
Harper Woods 36, Michigan
Telephone: 371-5111

Dated: July , 1963.

STATE OF MICHIGAN }
COUNTY OF WAYNE } ss.

WILSON M. JACKSON, being first duly sworn, deposes and says that he is the attorney for the Plaintiffs herein named, and that he is authorized to execute this complaint on their behalf; that he has read the foregoing complaint and that the contents therein are true to his knowledge and belief except as to those matters therein stated to be on information and belief, and as to those matters, he believes them to be true.

WILSON M. JACKSON
Attorney for Plaintiffs

Subscribed and Sworn to Before me a Notary Public, in and for the County of Wayne, this ..... day of July, 1963.

.....

LOIS M. JOHNSTON
Notary Public, Wayne County, Mich.
My Commission Expires: .....

PLAINTIFFS' EXHIBIT 1

ADDITIONAL PARTIES PLAINTIFF IN ACCORDANCE WITH AMENDED COMPLAINT

A) ST. CLAIR SHORES:
R. H. MURPHY and GAIL MURPHY, his wife;
JOHN D. DANTA and ROSEMARIE J., his wife;
WALTER M. WHEELER
DAVID B. DEN BAAS and CHRISTINE DEN BAAS, his wife;
LUCIENNE WESTON

ARTHUR E. DARROW and MADELINE DARROW, his wife;
RONALD J. KUZILA and MARILYN KUZILA, his wife;
JAMES O'HARA;
ARNOLD WOODWARD;
THOMAS R. THILL;
WILLIAM K. RAE;
HOWARD J. CONLIN;
WILLIAM MATISEK;
JACK L. LEONARD and VERA G. LEONARD, his wife;
OLIVER JACOB and MARY JACOB, his wife;
ROBERT L. HENSEL;
LESTER SIGGINS;
JOHN A. ROBERTS and PATRICIA ROBERTS, his wife;
RALPH P. STEPHEN and VIRGINIA M. STEPHEN, his wife;
GEORGE ROGERS;
JAMES V. KAMER;
LARRY HIPELL;
JOHN J. HOCK and MARY JANE HOCK, his wife;
DAVID FAIRCHILD and NANCY L. FAIRCHILD, his wife;
CLYDE MELLIGAN and VERA C. MELLIGAN, his wife;
JAMES WHYTE and ISABELL M. WHYTE, his wife;
JOSEPH F. ROZANEK and VIRGINIA ROZANEK, his wife;
ARNOLD RICHTER and JOHANNE RICHTER, his wife;

ALVIN R. SCARBROUGH and JOYCE A. SCARBROUGH, his wife;
STANLEY J. PLUTSCHECK and SHIRLEY A. PLUTSCHECK, his wife;
ADRIAN A. LINGEMANN;
MATHEW J. GABERTY and DOROTHY GABERTY, his wife;
FRED PROCIDA;
LEROY WM. HOWARD and DOROTHY M. HOWARD, his wife;
JAMES J. O'REILLY and MABEL R. O'REILLY, his wife;
CHARLES L. DAVIS and LILLIAN DAVIS, his wife;
IRVING W. WATSON and GERTRUDE WATSON, his wife;
HARRY J. PEARCE;
VICTOR M. TEERLINCK;
CHARLES GAIGALAS and ANNA GAIGALAS, his wife;
EDMUND ZIMMERMAN and HELEN ZIMMERMAN, his wife;
RUDOLPH F. POLLOCK and RUTH POLLOCK, his wife;
W. E. FORAKER and SARA B. FORAKER, his wife;
GERALDINE D. CRATER;
H. A. NEY and MARIE NEY, his wife;
VINCENT T. DALE and MILDRED J. DALE, his wife;
PETER WYTKA and SHIRLEY WYTKA, his wife;
HERMAN SCHUTZ and ANNA SCHUTZ, his wife;
GEORGE J. GEIGLE;
JOHN N. LESLIE and EMMA LESLIE, his wife;

F. B. TANNER and MARGUERITE TANNER, his wife;
LOUIS S. KOCH and KATHERINE KOCH, his wife;
JOSEPH DELISO, JR.;
HARRY D. JESSEE;
JAMES W. LOMBARDO;
DONALD L. GOLEMBA and BEVERLY A. GOLEMBA, his wife;
RICHARD A. WEBB;
STEPHEN R. KOROL and BETTY J. KOROL, his wife;
CLIFTON H. GABLER and JUNE E. GABLER, his wife;
RAYMOND M. SPENCER and NORMA M. SPENCER, his wife;
NORMAN F. FLYNN and FRANCES M. FLYNN, his wife;
ROBERT F. WILSON and JOAN D. WILSON, his wife;
DOUGLAS R. CROSS

B) EAST DETROIT
CHARLES W. SMALSTIG and ASENATH SMALSTIG, his wife;
EDWARD D. GAPS;
HAROLD D. JACOB and JOYCE M. JACOB, his wife;
EARL W. RISTOW and SHIRLEY A. RISTOW, his wife;

C) ROSEVILLE
STEWART W. BARRY and SOPHIE M. BARRY, his wife;
HAROLD R. HAVERCAMP and MARLENE B. HAVERCAMP, his wife;

JAN WIGMAN;
CHARLES E. REAGAN and SHIRLEY J. REAGAN, his wife;
RICHARD F. BENOIT and SUE F. BENOIT, his wife;
J. C. CORNILLIE;
JOHN C. LAMBRECT d/b/a LAMBRECT LUMBER & SUPPLY CO.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CIVIL ACTION
NO. 24000

FAIR DRAIN TAXATION, INC., a non-profit Michigan Corporation, JAMES J. SOULIGNY and JUANITA A. SOULIGNY, his wife, JOHN DYER-HURDEN and DOLORES DYER-HURDEN, his wife, ZACK D. EVANS and DOROTHY EVANS, his wife, LOUIS J. STAN and JOSEPHINE STAN, his wife, JOHN DURST and DOROTHY DURST, his wife, KARL R. HILDENBRAND and HALINA HILDENBRAND, his wife, THOMAS SYMS and JULIA SYMS, his wife, and W. ROSS JONES and ELIZABETH JONES, his wife,

Plaintiffs

—vs.—

CITY OF ST. CLAIR SHORES, a Michigan Municipal Corporation, CITY OF ROSEVILLE, a Michigan Municipal Corporation, CITY OF EAST DETROIT, a Michigan Municipal Corporation, The DRAINAGE BOARD FOR THE EIGHT AND ONE-HALF MILE RELIEF DRAIN,

a so-called Michigan Municipal Corporation, The DRAINAGE BOARD FOR THE STEPHENS RELIEF DRAIN, a so-called Michigan Municipal Corporation, The DRAINAGE BOARD FOR THE TEN MILE RELIEF DRAIN, a so-called Michigan Municipal Corporation, The DRAINAGE BOARD FOR THE ELEVEN AND ONE-HALF MILE RELIEF DRAIN, a so-called Michigan Municipal Corporation, The DRAINAGE BOARD FOR THE LAKE BOULEVARD RELIEF DRAIN, a so-called Michigan Municipal Corporation, The DRAINAGE BOARD FOR THE FORTIN RELIEF DRAIN, a so-called Michigan Municipal Corporation, The DRAINAGE BOARD FOR THE SOCIA-COUCHEZ RELIEF DRAIN, a so-called Michigan Municipal Corporation, The DRAINAGE BOARD FOR THE MARTIN SANITARY DIVERSION DRAIN, a so-called Michigan Municipal Corporation, The DRAINAGE BOARD FOR THE HECHTLER RELIEF DRAIN, a so-called Michigan Municipal Corporation, The DRAINAGE BOARD FOR THE MULSO-LIPKE RELIEF DRAIN, a so-called Michigan Municipal Corporation, The DRAINAGE BOARD FOR THE TEBO RELIEF DRAIN, a so-called Michigan Municipal Corporation, The DRAINAGE BOARD FOR THE ALEXANDER RELIEF DRAIN, a so-called Michigan Municipal Corporation.

All of which said Drainage Boards, so-called Michigan Municipal Corporations, consist of the following members and parties defendant herein:

THOMAS S. WELSH, Macomb County Drain Commissioner and Chairman of each of said Drainage Boards, BERNARD KALAHAR, Chairman of the Macomb County Board of Supervisors and member of each of said Drainage Board, FRANK BIEHL, Chairman of the Finance Committee of the Macomb County Board of Supervisors and

member of each of said Drainage Boards, (as provided in Chapter 20 of the State of Michigan Drain Code of 1956, as amended); The COUNTY OF MACOMB, a public corporation of the State of Michigan, The HONORABLE JOHN C. MACKIE, State Highway Commissioner of the State of Michigan, and The MICHIGAN MUNICIPAL FINANCE COMMISSION, a statutory administrative body,

Defendants

OPINION

O'Sullivan, Circuit Judge,
Levin, Chief District Judge,
Machrowicz, District Judge.

Thaddeus M. Machrowicz, District Judge

This is a class action instituted on behalf of the named plaintiffs of the Michigan cities of St. Clair Shores, East Detroit, and Roseville and all other similarly situated taxpayers of the State of Michigan to enjoin as unconstitutional the enforcement or the taking of any proceeding under the provisions of §§ 11.1461-11.1490 Mich. Stat. Ann., commonly known as and herein referred to as Chapter 20 of the Michigan Drain Code of 1956.

It may be said at the outset that litigation with respect to practically all the issues in this action has been before various courts of the State of Michigan immediately following the enactment of this legislation and continues to this day. As early as 1957, in *Connor* v. *Herrick*, 349 Mich. 201, and *Black Marsh Drainage District* v. *Rowe*, 350 Mich. 470, the Supreme Court of Michigan dealt with many of the issues presented here. See also subsequent opinions of the court of last resort of Michigan, *Twp. of Southfield*

Drainage Board for Twelve Towns Relief Drains, 357 Mich. 59 (1959); *City of Madison Heights* v. *Twelve Towns Relief Drains Drainage Board*, 361 Mich. 322 (1960); *In Re Petition of Macomb County Drain Commissioner*, 369 Mich. 641 (April 5, 1963).

The action was instituted by an original complaint filed on June 19, 1963, and pursuant to an order to show cause as to why a temporary injunction should not be issued as prayed for, a hearing on June 25, 1963, was had by this three-judge statutory court, 28 U.S.C. § 2281, 2284, and the application for a temporary injunction was denied. Because of the history of the many attacks upon this legislation in the state courts and despite the fact that no formal petition to dismiss was filed by the defendants, the court indicated that it was prepared to hear the parties on the merits of the complaint. However, plaintiffs' counsel stated that they were not prepared to discuss the merits of the complaint and asked for an adjournment to July 9, 1963, which was granted. The court, on that day, had before it a formal motion filed and served on July 1, 1963, by the defendants to dismiss the complaint and also had before it an amended complaint filed two (2) days previously with the consent of the court. Upon reviewing the amended complaint, and after a full hearing and admissions by plaintiffs' counsel, the court determined that the amended complaint did not present any new substantial matters not already included in the original complaint and proceeded to hear argument from all parties on the motion to dismiss the amended complaint.

The plaintiffs do not deny that the projected drains are essential for the health and safety of the communities of the state and they do not allege that there is fraud or other

improper conduct upon the part of any state official in the performance of his duty pursuant to the responsibilities imposed by the statute. Being satisfied that this litigation is vexatious in nature and that delay in announcing judgment would further harass and impede the carrying out of commitments for the financing of drains by governmental and private agencies and consequently retard the construction of the drain improvements found to be required by appropriate authorities, the court, before the close of the day of the hearing, entered a formal order dismissing the complaint with prejudice. The court expressed its intention to file a memorandum setting out its views with respect to the several issues raised by the plaintiffs.

Chapter 20 of the Drain Code of 1956 sets up a method by which the State of Michigan, a particular county, and the several public corporations[1] in that county may initiate by petition drain projects which are necessary for the public health and the cost of which is to be assessed wholly against the public corporations to be benefitted by the proposed drain.

Under the statute, a drain board is a *legislative body* created for each proposed drain. Its membership consists of the County Drain Commissioner, the Chairman of the Board of Supervisors, and the Chairman of the Board of County Auditors or of the Finance Committee of the Board of Supervisors. The drain district embraces the communities which are to be assessed for the cost of the drainage project. Pursuant to sections 467 and 469, the drainage board is to meet on two different occasions to hear objec-

[1] The term "public corporation" shall be deemed to include the state of Michigan, counties, cities, villages, townships, metropolitan districts and authorities created by or pursuant to state statutes. Section 11.1461 (b) M.S.A.

tions. On the first occasion, the board is to hear any objections to the proposed drain and to the matter of assessing the cost of such drain to the designated public corporations. The statute further provides that:

> "After such hearing, the drainage board shall make a determination as to the sufficiency of the petition, the practicability of the drain, whether the drain should be constructed, and if so, the public corporations to be assessed, and shall issue its order accordingly, which order shall be known as the 'final order of determination.' "

and that

> "No public corporation may be eliminated from, or added to, those tentatively determined to be assessed without a rehearing after notice, as above provided." Section 467.

On the second occasion, the board is to hear any objections made to the tentative apportionment of costs among the public corporations to be assessed. After such hearing or rehearing,

> ". . . the drainage board shall issue its order setting forth the several apportionments as confirmed, which order shall be known as the 'final order of apportionment.' " Section 469.

Notice for both public hearings and rehearings is provided for by sections 467 and 469:

> "Notice of such hearing shall be published twice in the county by inserting the same in at least 1 newspaper published therein, designated by the drainage board, with the first publication to be not less than 20 days prior to the time of hearing. Such notice shall

> also be sent by registered mail to the clerk or secretary of each public corporation proposed to be assessed, except that any notice to the state shall be sent to the state highway commissioner and any notice to a county shall be sent to both the county clerk and the county road commission, if any, which mailing shall be made not less than 20 days prior to the time of hearing."

Judicial review of the final order of determination and the final order of apportionment is limited under section 483 to:

> ". . . proceedings in certiorari brought within 20 days after the filing of such order in the office of the chairman of the board issuing the same. If no such proceeding shall be brought within the time above prescribed, the drain shall be deemed to have been legally established and the legality of the drain and the assessments therefor shall not thereafter be questioned in any suit at law or in equity, either on jurisdictional or nonjurisdictional grounds."

Section 473 provides for the preparation of the special assessment roll, which assesses the estimated cost of the drain against the several public corporations in accordance with the confirmed apportionments. The drainage board is empowered to permit the payment of the estimated assessment in annual installments, not exceeding thirty.

In cases where the assessment is not paid in full, section 474 calls for an annual assessment against public corporations similar to the assessment of private property by a municipal corporation. Chapter 20 gives the assessed public corporation the choice among three ways of financing the assessment; (1) Levy an *ad valorem* tax on all property;

(2) Levy a special assessment against the property receiving a special benefit, if any; and (3) Impose a connection charge. Sections 475, 490.

Chapter 20 drain proceedings in the State of Michigan have engendered considerable litigation in the state courts. The type of public improvement contemplated by Chapter 20 is one involving several public corporations and is designed to be used where it is more efficient and less expensive to incorporate a project into one large public improvement rather than to have each public corporation build its own separate smaller public improvement.

The plaintiffs allege that as citizens or taxpayers of the City of St. Clair Shores, Chapter 20 deprives them of their constitutional rights to vote on the question of whether or not the tax limitations of the City of St. Clair Shores shall be increased or otherwise changed by reason of the assessment against said city of portions of the cost of each drain project, or by reason of the obligation of the city to raise money to pay said assessment. This argument was made and rejected in *Southfield* v. *Drainage Board*, 357 Mich. 59.

The plaintiffs further contend that Chapter 20 is unconstitutonal because it unlawfully delegates to the City of St. Clair Shores and to the defendant drain boards and drain districts legislative and judicial powers. Chapter 20 was held constitutional in *Black Marsh Drain District* v. *Rowe*, 350 Mich. Under the 14th Amendment a legislature may either provide for the creation of a special district itself or delegate this authority to a tribunal. *Fallbrook Irrigation District* v. *Bradley*, 164 U.S. 112, 175.

The fact that lands in different public corporations benefitted by the same drain might and probably would be

assessed at different rates presents no meritorious constitutional challenge, since many citizens in public municipalities pay at a different rate for essentially equal services due to the structure of the municipality involved. It is not unreasonable for the legislature to have created the respective drain districts embracing the municipalities to be benefitted by the drain and for such drainage districts to determine the assessments to be made upon the municipalities which have the authority to make assessments on the individual property owners.

Further, under the due process clause, it is clearly constitutional to levy a general *ad valorem* tax for a local improvement benefitting some lands more than others. See *Fallbrook* v. *Bradley*, 165 U.S. 112, 176; *Connor* v. *Herrick*, 349 Mich. 201, 244. (Opinion of Mr. Justice Carr adopted by the court in *Black Marsh Drainage District* v. *Rowe*, 350 Mich. 470). Also, special assessment districts set up according to special benefits are constitutional. *Hagar* v. *Reclamation District No. 108*, 111 U.S. 701, 705; *Cummings* v. *Garner*, 213 Mich. 408. Therefore, it is permissible for the legislature to give the assessed public corporation the option of either levying a general *ad valorem* tax or providing for a special assessment.

Plaintiffs further contend that the notice provisions of sections 467 and 469 violate both the state and the federal constitutions. It is important to recognize that the final orders of determination and apportionment bind the public corporations involved, which must receive notice by registered mail under the statute. Notice by publication is also

provided, but plaintiffs contend that they are entitled, as the class of people which may ultimately bear the burden of paying for the drain, to more effective notice than that of publication. But as such a class, plaintiffs are effected only indirectly and to the same degree as all other taxpayers in the preliminary stages of Chapter 20 proceedings which culminate in the final orders of determination and apportionment. Not until the proceedings reach the stage where it becomes necessary to decide what proportion of the cost of the proposed improvement shall be assessed to the particular parcel of land which each plaintiff owns, must opportunity be given to them as owners to be heard upon that question (see *Voight* v. *Detroit*, 184 U.S. 115), and Michigan law affords opportunity to question such direct assessment on their property, upon proper notice and at an adequate hearing. See also *Chicago etc. R.R.* v. *Risty*, 276 U.S. 567; *Embree* v. *Kansas City Road Dist.*, 240 U.S. 242; *Soliah* v. *Heskin*, 222 U.S. 522; *Londoner* v. *Denver*, 210 U.S. 373; *Goodrich* v. *Detroit*, 184 U.S. 432. We hold, therefore, that the notice provisions contained in sections 467 and 469 of Chapter 20 are constitutional.

One further word—One of the allegations in plaintiffs' shotgun amended complaint is that the issuance of bonds by defendants drainage boards to provide funds for the construction of drains would result in a burden on interstate commerce in violation of Article 1, Section 8 of the Constitution. They do not allege that they are misled by either the bond and notice of sale provisions or by any underlying Michigan legislative enactments. This does not require any discussion, but it is strange indeed that the plaintiffs take the position that they have a right to appear on behalf of others to assert federal constitutional guarantees.

We have considered section 1341, 38 U.S.C.[1] but do not deem it necessary to discuss its application to this amended complaint.

THADDEUS M. MACHROWICZ,
U.S. District Judge

Dated at Detroit, Michigan this
16th day of July, 1963.

A TRUE COPY
JULIUS L. KABATSKY, Clerk
By: WALTER BIELSKI, Deputy Clerk

[1] "The District courts shall not enjoin, suspend or restrain the assessment, levy, or collection of any tax under state law where a plain, speedy, and efficient remedy may be had in the state courts of such state."

CHAPTER 20

INTRACOUNTY DRAINS; PUBLIC CORPORATIONS

§ 11.1461 Definitions.] SEC. 461. Whenever used in this chapter, except when otherwise indicated by the context:

(a) The term "state" shall be deemed to mean the state of Michigan.

(b) The term "public corporation" shall be deemed to include the state of Michigan, counties, cities, villages, townships, metropolitan districts and authorities created by or pursuant to state statutes.

(c) The term "agencies" shall be deemed to include those officers, boards, commissions and other bodies created by public corporation or by the federal government, which are authorized to act in their own names.

(d) The term "county drain" shall be deemed to mean any drain as defined in this act, irrespective of size, carrying drainage water and or sewage originating in 1 county. The finding of the drainage board that all drain water and sewage does originate in 1 county shall be final. In making such determinations, the drainage board may disregard any drainage from another county which it deems to be inconsequential.

(CL '48, § 280.461.)

§ 11.1462 Construction of county drain necessary for public health; assessment of cost against public corporation.] SEC. 462. County drains which are necessary for the public health may be located, established and constructed under the provisions of this chapter where the cost thereof is to be assessed wholly against public corporations. (CL '48, § 280.462.)

§ 11.1463 Same; petition, filing, signatures, contents.] SEC. 463. Whenever it shall be necessary for the public health to locate, establish and construct a county drain, then a petition therefor may be filed with the county drain commissioner signed by 2 or more public corporations which will be subject to assessments to pay the cost thereof. Such petition shall state that it is filed pursuant to the provisions of this chapter and shall describe the location and route of such proposed drain sufficiently to determine with reasonable certainty the areas to be drained thereby. Attached to said petition shall be a certified copy of the resolution of the governing body of each signer authorizing the affixing of its signature thereto. Such petition may be filed in more than 1 counterpart. (CL '48, § 280.463.)

§ 11.1464 Same; drainage board, membership, compensation of supervisor members, chairman; minutes; records and files.] SEC. 464. There is hereby created for each project petitioned for under the provisions of this chapter, a drainage board to consist of the drain commissioner of the county, the chairman of the county board of supervisors and the chairman of the board of county auditors; Provided, That if there be no board of county auditors in any such county, then the chairman of the finance committee of the board of supervisors shall act as a member of said drainage board, and if there be neither a board of county auditors nor finance committee, then the chairman of the board of supervisors shall select from time to time 1 member of the board of supervisors of his county to act as a member of said drainage board. The chairman of the board of supervisors and any member of a board of supervisors serving on the drainage board shall receive the same compensation and mileage as provided for members of the board of supervisors. The county drain commissioner shall be chairman of

the drainage board. He shall keep minutes of the proceedings of the drainage board and all records and files of the board shall be kept in his office. (CL '48, § 280.464.)

§ 11.1465 Meetings of drainage board; calling, notice, quorum, adjournment, majority vote, signing of orders by chairman.] SEC. 465. Meetings of the drainage board may be called by the chairman or any 2 members thereof, upon notice sent by registered mail to each member, setting forth the time and place thereof, which notice shall be mailed not less than 5 days previous to the time of the meeting. The affidavit of the chairman as to such mailing shall be conclusive proof thereof. No notice of any meeting shall be required if all members are present. Any member of said board may waive notice of any meeting, either before or after such meeting. A majority of the members of the board shall constitute a quorum for the transaction of business, but a lesser number may adjourn from time to time. Any meeting may be adjourned from time to time. Unless otherwise provided herein, no action shall be taken by said board except by a majority vote of its members. In the event of the adjournment of any hearing, it shall not be necessary to advertise the adjournment of such hearing. All orders issued by the drainage board shall be signed by the chairman. (CL '48, § 280.465.)

§ 11.1466 Same; first meeting, notice.] SEC. 466. Upon receipt of a petition as hereinbefore provided, the county drain commissioner shall call the first meeting of the drainage board. In the event there be no board of county auditors or finance committee in the county, then notice to the chairman of the board of supervisors of such county shall be deemed to be notice to the member of the board of supervisors to be selected by him. (CL '48, § 280.466.)

§ 11.1467 Duty of drainage board at first meeting; composition of district; hearing of objections, notice; final order of determination; elimination or addition of public corporations.] SEC. 467. The said drainage board at its first meeting shall consider the petition for the project and make a tentative determination as to the sufficiency thereof and the practicability of the proposed drain, and shall also make a tentative determination of the public corporations to be assessed. Said drainage board shall give a name to the drain and to the drainage district. The district shall be composed of the public corporations to be assessed for the cost of the project. After the drainage board has made the determination specified in the first sentence of this section, then it shall fix a time and place when and where it will meet to hear any objections to the proposed drain and the petition therefor, and to the matter of assessing the cost of such drain to the designated public corporations. Notice of such hearing shall be published twice in the county by inserting the same in at least 1 newspaper published therein, designated by the drainage board, with the first publication to be not less than 20 days prior to the time of hearing. Such notice shall also be sent by registered mail to the clerk or secretary of each public corporation proposed to be assessed, except that any notice to the state shall be sent to the state highway commissioner and any notice to a county shall be sent to both the county clerk and the county road commission, if any, which mailing shall be made not less than 20 days prior to the time of hearing. Such notice shall be signed by the chairman and proof of the publication and mailing thereof shall be filed in his office. The drainage board may provide a form to be substantially followed in the giving of such notice. At such hearing, any public corporation to be assessed or any taxpayer thereof

shall be entitled to be heard. After such hearing, the drainage board shall make a determination as to the sufficiency of the petition, the practicability of the drain, whether the drain should be constructed, and if so, the public corporations to be assessed, and shall issue its order accordingly, which order shall be known as the "final order of determination." No public corporation may be eliminated from, or added to, those tentatively determined to be assessed without a rehearing after notice, as above provided. (CL '48, § 280.467.)

§ 11.1468 Plans, specifications and estimate of cost; route of drain; apportionment of cost after designation of area to be served; assumption by county of additional cost.]

SEC. 468. The drainage board shall proceed to secure from a competent engineer, plans, specifications and an estimate of cost of the proposed drain, which, when adopted by said board, shall be filed with the chairman thereof. In approving the route of the drain, the drainage board shall not be limited to that described in the petition. The drainage board shall then proceed to tentatively establish the percentage of the cost of such drain which is to be borne by each public corporation. In making the apportionments hereunder, there shall be taken into consideration the benefits to accrue to each public corporation and also the extent to which each public corporation contributes to the conditions which make the drain necessary: Provided, That apportionments against the state shall be based solely upon the drainage of state highways, and those against the county shall be based solely upon the drainage of its county highways. [Before any tentative apportionment shall hereafter be made, the drainage board shall designate the area to be served by the drain project, which may or or may not include all of the area in any public corporation to be assessed.] Nothing

herein contained shall prohibit the county from assuming any additional cost of said drain if 2/3 of the members-elect of the county board of supervisors shall vote in favor thereof. (CL '48, § 280.468.)

§ 11.1469 Objections to apportionment; hearing, notice; confirmation of apportionments; readjustment; final order of apportionment.] SEC. 469. After the foregoing tentative apportionments of cost have been made, then the drainage board shall set a time and place when and where it will meet and hear any objections to such apportionments. Notice of such hearing shall be published twice in the county by inserting the same in at least 1 newspaper published therein, designated by the drainage board, the first publication to be not less than 20 days prior to the time of hearing. Such notice shall also be sent by registered mail to the clerk or secretary of each public corporation proposed to be assessed, except that any notice to the state shall be sent to the state highway commissioner and any notice to the county shall be sent both to the county clerk and the county road commission, if any, which mailing shall be made not less than 20 days prior to the time of hearing. Such notice shall be signed by the chairman and proof of the publication and mailing thereof shall be filed in his office. The drainage board may provide a form to be substantially followed in the giving of such notice. The notice shall include tentative apportionments to the several public corporations. At such hearing, any public corporation to be assessed or any taxpayer thereof shall be entitled to be heard. After such hearing, the drainage board may confirm the apportionments as tentatively made, or if in any respect it shall deem such apportionments to be inequitable, it shall readjust the same: Provided, That if such readjustment shall involve the increasing of any assessment and such

increase shall not be consented by the resolution of the governing body of the public corporation whose assessment was increased, then before any readjusted apportionments shall be confirmed the drainage board shall set a time and place for a rehearing and shall give notice thereof as in the first instance, which notice shall also set forth the apportionments as readjusted. After confirmation, the drainage board shall issue its order setting forth the several apportionments as confirmed, which order shall be known as the "final order of apportionment." (CL '48, § 280.469.)

§ 11.1470 Securing necessary lands and rights of way.] SEC. 470. The drainage board shall then proceed to secure the necessary lands and or rights of way for the proposed drain. If the same cannot be secured by negotiation, then the drainage board may proceed under the provisions of Act No. 149 of the Public Acts of 1911, as amended, being sections 213.21 to 213.41, inclusive, of the Compiled Laws of 1948, and shall be deemed to be a "state agency" as that term is used in said act, or if the project is one in which the federal government is participating in any manner, then such lands and or rights of way may be acquired through proceedings brought by the federal government under any appropriate federal act. In the event lands and or rights of way shall be acquired through proceedings under a federal act, then the amount of the awards in such proceeding shall be deemed to be a part of the cost of the drain to the same extent as if the condemnation proceedings had been taken under the laws of this state. (CL '48, § 280.470.)

§ 11.1471 Contracting with federal government or private or public corporation; starting of construction, bids, exception.] SEC. 471. The drainage board may contract with the federal government (which term as used in this

section shall include any agency thereof) whereby the federal government will pay the whole or any part of the cost of the project and/or will perform the whole or any part of the work connected therewith, which contract may include any specific terms required by act of congress or federal regulation as a condition for such participation on the part of the federal government The drainage board may also contract with any private corporation or with any public corporation (which term as used in this section shall include any agency thereof) in respect to any matter connected with the construction and/or maintenance of any drain. Such a contract may provide that any payments made or work done by such public corporation shall relieve it in whole or in part from assessment for the cost of the project. No construction work shall be undertaken until the drainage board has advertised for and received bids for the performance of such work: Provided, That this provision shall not apply to work to be performed by the federal government or a public corporation. (CL '48, § 280.471.)

§ 11.1472 County treasurer custodian of district funds; bond; moneys to be paid out only on order of board, exception.] SEC. 472. The county treasurer shall be the custodian of the funds of the drainage district. The drainage board may require the county treasurer to furnish a bond payable to the drainage district, in addition to any bond payable to the county, conditioned upon the faithful discharge of his duties in respect to moneys belonging to the drainage district, the premium thereon to be paid by the drainage district. Moneys held by said treasurer shall be paid out only upon order of the drainage board, except that no such order shall be required for the payment of principal and interest on bonds. (CL '48, § 280.472.)

§ 11.1473 Special assessment roll; preparation; payment of assessments, interest; advance payment.] SEC. 473. After the confirmation of the apportionments by the drainage board, it shall cause to be prepared by the chairman of said board a special assessment roll assessing the estimated cost of the drain (or if the actual cost has been ascertained, then such actual cost) against the several public corporations in accordance with the confirmed apportionments. The drainage board may provide for the payment of such special assessments in any number of ◆ annual installments, not exceeding 30[, but no installment shall be less than 40% of any subsequent installment]. Installments of assessments shall become due and payable on or before April first of each year. The drainage board shall fix the amount of interest, not exceeding 6%, to be paid upon unpaid installments, which interest shall become due annually on the day and month upon which the annual installments become due. ◆ [The drainage board may provide for the payment of any installments in advance of their respective due dates and may prescribe the terms and conditions thereof.] The drainage board shall fix the time or times for the payment of the first installment so that each public corporation can make a tax levy for the payment thereof. (CL '48, § 280.473.)

§ 11.1474 Same; contents, approval; certification of assessment to public corporation assessed; notification of due installments and interest, payment; advancement of money for payment by county treasurer, reimbursement; assessments against state; levy of taxes; assesment roll prepared on basis of estimated cost, correction of assessments.] SEC. 474. The special assessment roll shall contain the name of each public corporation assessed, the total estimated cost of the project (or actual cost if the same has been ascertained at the time of the preparation of the roll),

the percentage apportioned to each public corporation, the amount of the assessment against each public corporation based upon the said percentage of apportionment, and the amount of each installment if the assessment is divided into annual installments. After the said special assessment roll has been prepared, it shall be presented to the drainage board for approval. When such roll shall have been approved, then a statement to that effect, signed by the chairman of the drainage board, shall be affixed to said roll setting forth the date of such approval. The chairman of the drainage board shall then certify to each public corporation assessed the amount of the total assessment against it, the amount of the various installments if such assessment is divided into installments, the due date of each installment and the rate of interest upon installments from time to time unpaid. The chairman shall also each year, at least 30 days prior to the time of the levying of taxes by each public corporation, notify it of the amount of the installment and interest next becoming due: Provided, That the failure to so notify any public corporation shall not excuse it from making payment of such installment and interest. On or before the due date of any installment, each public corporation shall pay to the county treasurer the full amount thereof, together with interest accruing to such due date. If any such public corporation shall fail or neglect to so account to the county treasurer for the amount of any such installment and interest, then the county treasurer shall advance the amount thereof from county funds and deduct the same from any moneys (other than those pledged for the payments of debts) then or thereafter payable by him to such public corporation. The board of supervisors of any county which shall have advanced any money for a public corporation and which shall not have been reimbursed therefor,

may order such public corporation and its officers to levy upon its next tax roll an amount sufficient to make such reimbursement on or before the date when its taxes become delinquent; and it shall be the duty of such public corporation and its tax levying and collecting officials to levy and collect such taxes and to reimburse the county: Provided, That the foregoing shall not prevent the county from obtaining reimbursement by any other legal method. Assessments against the state shall be certified to the state highway commissioner and paid from state highway funds. It shall be the duty of the tax levying officials of each of the other public corporations assessed to levy sufficient taxes to pay assessment installments and interest as the same shall become due unless there shall have been set aside moneys sufficient therefor. Any city may elect to spread such tax levy upon the county tax roll instead of the city tax roll. If a special assessment roll shall be prepared upon the basis of the estimated cost of the project, then after the actual cost has been ascertained and determined by the drainage board, the special assessments and the installments thereof shall be corrected by adding any deficiency or deducting any excess. The drainage board may order such corrections to be made upon the original roll or may order that a new corrected roll or a supplemental roll be prepared and submitted for approval by the drainage board. (CL '48, § 280.474.)

§ 11.1475 Assessments and taxes as not within debt or tax limitations; constitutional tax limits, observance.] SEC. 475. Assessments made under the terms of this chapter shall not constitute an indebtedness of a public corporation within any statutory or charter debt limitation, and taxes levied by a public corporation for the payment of such assessments shall not be deemed to be within any

statutory or charter limitation. [Noting contained in this chapter shall be construed as requiring any county, township, metropolitan district or authority to levy a tax beyond its constitutional tax limitation or any lawful increase thereof.] (CL '48, § 280.475.)

§ 11.1476 Issuance of bonds; payment; collections of assessment installments to be kept in separate bank account, use.] SEC. 476. The drainage board may issue bonds for and on behalf of the drainage district, in anticipation of the collection of any or all installments of assessments or any part thereof, and pledge the full faith and credit of the drainage district for the prompt payment of the principal thereof and the interest thereon. Such bonds shall mature serially with the last maturity not later than 2½ years after the due date of the last installment of the assessments: Provided, That there may be more than 1 principal maturity date during any 12-month period. The bonds shall be signed by the chairman and at least 1 other member of the drainage board and the facsimile signature of the chairman shall be affixed to the interest coupons attached thereto. Collections of both principal and interest on all installments of assessments in anticipation of which bonds shall have been issued shall be kept in a separate bank account by the county treasurer and used for no other purpose than the payment of principal and interest on such bonds until the full payment thereof. (CL '48, § 280.476.)

§ 11.1477 Same; assessments insufficient to pay principal and interest, additional assessments.] SEC. 477. If, for any reason, the original assessments shall not be sufficient to pay the principal and interest on bonds issued in anticipation of the collection thereof, then the drainage board shall make such additional assessments therefor as may be

necessary, apportioned as in the first instance, it being the intention hereof that the collections on assessments shall, under all circumstances, be sufficient to pay said principal and interest. (CL '48, § 280.477.)

§ 11.1478 Drainage board to continue in existence; responsible for operation and maintenance of drain; payment of expenses.] SEC. 478. The drainage board for each project shall continue in existence with such changes in personnel as shall result from changes in the officers constituting the board membership. It shall be responsible for the operation and maintenance of the drain. Any necessary expenses incurred in administration and in the operation and maintenance of the drain shall be paid by the several public corporations assessed, in the same proportion as the cost of the drain was assessed. (CL '48, § 280.478.)

§ 11.1479 Advancement of moneys by public corporation; reimbursement.] SEC. 479. Any public corporation may advance moneys for the payment of any part of the cost of a project hereunder in which event it shall be reimbursed by the drainage district when funds are available therefor. (CL '48, § 280.479.)

§ 11.1480 Cost of drain, what included.] SEC. 480. The cost of any drain shall include (1) the cost of locating, establishing and constructing the drain; (2) the administrative and other expenses of the drainage board; (3) the cost of construction of bridges and culverts; (4) the cost of acquiring any lands and/or rights of way; (5) all engineering, legal and other professional fees; (6) the cost of the service and publication of all notices; (7) interest on bonds for the first year, if bonds are to be issued; and (8) an amount not exceeding 10% of the gross sum to cover contingent expenses. (CL '48, § 280.480.)

§ 11.1481 Assessment against township as a whole; assessment of village separately.] SEC. 481. Unless otherwise provided by the drainage board, assessments against a township shall be against the township as a whole, including any incorporated village, but the drainage board may determine to assess a village separately, in which case the assessment against the township shall be exclusive of the village and the tax levies to be made by the township to pay such assessment shall not include any property taxable in the village. (CL '48, § 280.481.)

§ 11.1482 Cleaning, relocating, widening, etc., of county drain; financing of cost.] SEC. 482. Any county drain or any portion thereof, now or hereafter existing, may be cleaned out, relocated, widened, deepened, straightened, tiled or otherwise improved, when necessary for the public health, in the same manner as a county drain may be located, established and constructed under this chapter, with such variations in the proceedings as may be necessary to make the same applicable, and also the cost thereof may be financed in like manner. (CL '48, § 280.482.)

§ 11.1483 Attack of final order of determination or final order of apportionment; certiorari, time, effect of failure to bring.] SEC. 483. Neither the final order of determination nor the final order of apportionment shall be subject to attack in any court, except by proceedings in certiorari brought within 20 days after the filing of such order in the office of the chairman of the board issuing the same. If no such proceeding shall be brought within the time above prescribed, the drain shall be deemed to have been legally established and the legality of the drain and the assessments therefor shall not thereafter be questioned in any

suit at law or in equity, either on jurisdictional or non-jurisdictional grounds. (CL '48, § 280.483.)

§ 11.1484 Operating under terms of chapter, applicability of provisions of other chapters.] SEC. 484. In operating under the terms of this chapter, the several boards and officials shall not be limited by the provisions contained in other chapters of this act and the procedures required under the terms of such other chapter shall not be deemed to be applicable: Provided, That when not contrary to the express provisions of this chapter, any provision or provisions in other chapters of this act may be incorporated by recital or by references into any order or resolution of the drainage board, and when so incorporated shall be deemed applicable to the project under this chapter. (CL '48, § 280.484.)

§ 11.1485 Two or more public corporations constituting a contiguous territory and served by one or more drains; relief drains, construction and financing.] SEC. 485. When 2 or more public corporations, constituting as a whole contiguous territory, are served by 1 or more county drains, and it shall become necessary for the public health to supplement such existing drain or drains by constructing 1 or more relief drains, which may consist of new drains and/or extensions, enlargements and/or connections to existing drains, then the entire project may be constructed and financed as a whole under the provisions of this chapter and the word "drain" shall be deemed in include such a project. (CL '48, § 280.485.)

11.1486 Applicability of chapter to drain entirely within limits of public corporation; signature of petition.] SEC. 486. The terms of this chapter shall be applicable to any county drain located, or proposed to be located, entirely within the limits of a single city, village or township, if

such public corporation shall consent thereto by resolution adopted by its governing body. In such case any petition required to be filed hereunder shall be sufficient if signed by such public corporation only. (CL '48, § 280.486.)

§ 11.1487 Drain commissioner acting by deputy; vice-chairmen of other boards or committees acting in lieu of chairmen.] SEC. 487. Any drain commissioner may act under this chapter or under chapter 21, being sections 511 to 537, inclusive, of this act, by his deputy, under any and all circumstances. The vice-chairman or chairman pro tem of a county board of supervisors, or the vice-chairman of a board of county auditors or of a finance committee of a county board of supervisors, may act in lieu of the chairman of such board or committee, in event of the absence of such chairman from a meeting of the drainage board. (CL '48, § 280.487.)

§ 11.1488 Chapter deemed additional grant of power; inapplicability to completed drains.] SEC. 488. The provisions of this chapter shall be construed as an additional grant of power to that prescribed by other statutory provisions.

Projects completed prior to November 21, 1951, shall not be financed under this chapter.

(CL '48, § 280.488.)

§ 11.1489 Service of notices where incorporation of new city is incomplete; prior service in manner provided in section.] SEC. 489. Whenever a new city has been or shall be incorporated but such incorporation shall not have been completed by the adoption of a city charter, then any notice required by this chapter to be served upon the city clerk shall be served upon the clerk or clerks of the township or townships from which the city was incorporated: Provided,

That if a city charter shall have been submitted, but rejected by the electors, then such notice shall also be served upon the de facto officer of the city, if there be such an officer. Service of any notice made prior to the effective date of this amendment, which was made in the manner provided in this section, is hereby declared to be a valid compliance with the terms of this act in respect to service upon the city clerk. (CL '48, § 280.489.)

§ 11.1490 Special assessments, especially benefited lands; collections; disposition; application of section; alternate method of financing.] SEC. 490. If the legislative body of a public corporation which shall have been assessed under this chapter, shall determine that a part of the lands therein will be especially benefited by the drain project to the extent of any portion of the amount so assessed, then it may cause such portion to be assessed, according to benefits, against the especially benefited lands, provided such special assessment method of financing is not inconsistent with local financing policy as to similar drains and sewers. The assessment shall be made under the statutory or charter provisions governing special assessments in the public corporation insofar as they may be applicable, except that no petition shall be required from property owners. In the event the special assessments shall be levied, then all collections therefrom shall be used towards the payment of the assessment at large against the public corporation and each annual levy to be made for the payment of such assessment at large shall be reduced by the amount of money then on hand from special assessment collections available for such use. This section shall be applicable only where the drain assessment roll is confirmed subsequent to the effective date of this section. Nothing herein contained shall be construed to prevent the assessing of public corporations at

large under this chapter, it being the intention hereof to provide a method whereby a public corporation may raise moneys by special assessments as above provided where such procedure conforms with local practice. In lieu of levying special assessments, the public corporation under the same conditions and for the same purpose may exact connection charges to be paid by owners of land directly or indirectly connected with the drain project. (CL '48, § 280.490.)

(Title of Court and Cause)

MOTION FOR CLARIFICATION OF THE COURTS DETERMINATION

Now come the Plaintiffs by their attorneys, WILSON M. JACKSON and WILLIAM L. SANDERS, and move the honorable Court for a clarification of the determination of the Court heretofore made, showing unto the honorable Court as follows:

1. On June 19, 1963, the Honorable Thaddeus M. Machrowicz, United States District Judge, signed an Order to Show Cause directed to the Defendants, and each of them, relative to the issuance of a temporary injunction during the pendency of this cause.

2. Under date of June 24, 1963, the Defendant City of St. Clair Shores, members of the drainage boards, and the drainage districts, filed their "Statement on Behalf of Defendant City of St. Clair Shores, Members of Drainage Boards and Drainage Districts", wherein they allegedly showed cause why the prayer set forth in the Complaint for both interlocutory and permanent injunctive relief should be denied, and in which they alleged the Court was without jurisdiction in the matter because a plain, speedy and efficient remedy was available in the Courts of Michigan. These Defendants in their Statement alleged:

(a) The Complaint raised solely issues of the construction of the laws of the State of Michigan enacted under its police powers,

(b) The laws of the State of Michigan furnished easy and ample means for determination of legal issues, both statutory and constitutional arising from the Complaint,

(c) The matter in controversy did not exceed the sum or value of Ten Thousand ($10,000.00) Dollars and therefore jurisdiction was lacking;

(d) The Macomb County Circuit Court had assumed jurisdiction in two (2) pending actions over the duties and rights of the three (3) Defendant cities named in the Complaint;

(e) The suit in the Federal District Court was a collateral attack and interference with such pending state court suits;

(f) The Plaintiffs, as taxpayers, alleged no facts which gave them standing to test the validity of the Municipal Finance Act of the State of Michigan and other objections.

3. At a hearing held on June 25, 1963, it was determined that the temporary injunction should be denied and the Court upon request of Plaintiffs' counsel allowed until July 9, 1963, to answer the claims alleged by Defendants, and also allowed Defendants to present formal objections in the nature of a Motion to Dismiss;

4. On July 9, 1963, a hearing was held, after argument and briefs by both counsel, the Court, through the Honorable Clifford O'Sullivan, announced the position of the Court as follows:

> "Now, this is a matter of very great importance to the Plaintiffs as well as to the Defendants, and we have tried to give earnest consideration to the positions of both the parties, to all parties litigant, that are here today. Frankly, we wish that we could have more time for contemplative consideration of the legal points involved, but we think that this being

a matter of great public concern, in fact, it involves the public health of the persons who will be affected by what we do and therefore, we cannot give ourselves that opportunity to more quietly and leisurely consider the legal question. It is a matter of such emergency nature that prompt decision of it should be made. The affairs of several of the municipalities in Macomb County, Michigan, are involved, as well as the people of these municipal bodies and municipal divisions and the public health in the areas referred to may be impaired unless the projects now under attack are permitted to go forward without further delay. We think therefore without raising the writing of a formal opinion or memorandum we should announce at this should be made. The affairs of several of the municipalities in Macomb County, Michigan, are involved, as well as the people of these municipal bodies and municipal divisions and the public health in the areas referred to may be impaired unless the projects now under attack are permitted to go forward without further delay. We think therefore without raising the writing of a formal opinion or memorandum we should announce at this time our disposition of the case before us. We would thereupon the presentation of an order to that effect, dismiss the original as well as the Amended Complaint, both on our own motion, and upon the motion to dismiss that has been filed by the Defendants. To further expose our views in a memorandum that may be filed as quickly as it can be done but we do at this time announce our holding substantially as follows: WE FIND THAT BOTH THE ORIGINAL AND THE AMENDED COMPLAINT BEFORE

US DO NOT EITHER OF THEM STATE A CAUSE OF ACTION, WITHIN THE JURISDICTION OF THIS COURT NOR DOES IT STATE A CAUSE OF ACTION. Assuming the truth of whatever factual allegations are contained in the original and the Amended Complaint, we find that they do not disclose that any federally granted constitutional rights of Plaintiffs have been invaded, nor do we find that the Michigan statutes described in and attacked by the Complaint and the Amended Complaint in their operation as described in those, pleadings, invade or impair any of the Plaintiffs federally granted constitutional rights. Inasmuch as the matter is before us, we likewise find the opinion and find that the Michigan statutes mentioned under attack in the pleadings before us have not been employed, as described in the pleadings to offer any constitutional rights granted to these Plaintiffs by the Constitution of the State of Michigan. Now, on the question of this Courts' abstention from entering into a case which in our opinion, if it had merits to it, could have been presented and could be presented to the State Courts of Michigan. We feel that the ultimate objective of the Complaint and the Amended Complaint is to simply explain the assessment, levy and collection of taxes under the laws of the State of Michigan. Section 1341, Volume 28 of the U.S. Code, forbids a District Court of a United States District Court, from bearing any such restraint under the Federal Statutes. We are of the opinion that if there were any merit to the Plaintiffs' position, these Plaintiffs have a plain, speedy, and efficient remedy available in the Courts of Michigan."

5. At the end of said hearing, counsel for the Defendants presented to the Court an order for its approval, which order, plaintiffs believe to be in the file in this cause and of which Plaintiffs have never received a copy. Plaintiffs are informed that the last paragraph thereof reads as follows:

> "It is hereby further ordered, adjudged and decreed that the said Complaint and the Amended Complaint be and the same are dismissed for failure to state a claim upon which relief can be granted, with prejudice, and with no costs."

6. On July 16, 1963, the Honorable Thaddeus M. Machrowicz, United States District Judge, filed a document entitled "Opinion" in this matter, the original of which is believed to be in the file of this Court. This opinion appears to be a discussion of the issues of this case relative to the unconstitutionality of Chapter 20 of the Drain Code of 1956, and a determination that in fact, Chapter 20 of the Drain Code of 1956 was not unconstitutional.

7. Plaintiffs are preparing to take further action to seek the relief which they feel they are entitled to but are unable to do so because of what seems to be contradictory positions of the Court as announced by the Honorable Clifford O'Sullivan in the sentence as follows:

> "To further expose our views in a memorandum that may be filed as quickly as it can be done but we do at this time announce our holding substantially as follows: WE FIND THAT BOTH THE ORIGINAL AND THE AMENDED COMPLAINT BEFORE US DO NOT EITHER OF THEM STATE A CAUSE OF ACTION WITHIN THE JURISDIC-

TION OF THIS COURT NOR DOES IT STATE A CAUSE OF ACTION."

8. The position of the Plaintiffs is that a clarification of this matter is necessary to settle whether the suit was dismissed for lack of jurisdiction or whether it was dismissed upon the merits.

WHEREFORE, Plaintiffs pray this Court clarify its determination as to whether or not the matter was dismissed for lack of jurisdiction and the specific ground; or whether or not it was dismissed upon the factual, constitutional or statutory grounds.

Dated: July 23, 1963.

/s/ WILSON M. JACKSON
/s/ WILLIAM L. SANDERS
Attorneys for the Plaintiffs
132 Eastland Ctr., Prof. Bldg.
Harper Woods 36, Michigan
371-5111.

(Title of Court and Cause)

SUPPLEMENTAL OPINION

HONORABLE CLIFFORD O'SULLIVAN, Circuit Judge, 6th Circuit, HONORABLE THEODORE LEVIN, Chief District Judge, HONORABLE THADDEUS M. MACHROWICZ, District Judge.

Thaddeus M. Machrowivz, District Judge

This Court, on July 9th, 1963, entered an Order "that the said complaint and the amended complaint be, and the same are dismissed for failure to state a claim upon which relief can be granted, with prejudice and with no costs".

The said Order was preceded by an oral opinion in which the Honorable Clifford O'Sullivan, speaking for the entire Court, said, in part:

> "We think, therefore, without waiting the writing of a formal opinion or memorandum that we should announce at this time our disposition of the case before us . . .
>
> "We will, upon presentation to us, of an Order to that effect dismiss the original, as well as the amended complaint, both on our motion and upon the motion to dismiss that has been filed by the defendants.
>
> "We will further expose our views in a memorandum that may be filed as quickly as it can be done, but we do at this time announce our holding substantially as follows:
>
> "We find that both the original and the amended complaint before us do not, either of them, state a

cause of action, in the jurisdiction of the Court, nor do we state a cause of action."

Pursuant thereto, and after full and deliberate consideration this Court on July 16th, 1963, filed a written opinion in which the Court more fully elaborated its reasons for the finding and order of the Court on July 9th, 1963.

On July 25th, 1963, plaintiffs filed a "Motion for Clarification of the Court's Determination" noticing the hearing on said motion for August 5th, 1963, at 9:30 A.M.

Having fully considered plaintiff's motion for clarification, this Court re-affirms its order of dismissal and opinion, determining that the complaint and amended complaint are dismissed on their merits for failure to state a claim upon which relief can be granted.

THADDEUS M. MACHROWICZ
Thaddeus M. Machrowicz,
U. S. District Judge

Dated: at Detroit, Michigan this 5th day of August, 1963.
A TRUE COPY
JULIUS L. KABATSKY, Clerk
By Walter Bielski
Deputy Clerk